# IN THE SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1965**



**No. 761**

---

CARL CALVIN WESTOVER,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

---

## OPENING BRIEF FOR THE PETITIONER

---

F. CONGER FAWCETT
GRAHAM JAMES & ROLPH
310 Sansome Street
San Francisco, California

*Attorneys for Petitioner*

# INDEX

## SUBJECT INDEX

CITATIONS

CASES:

STATUTES:



REGULATIONS:



ARTICLES AND MISCELLANEOUS:

# IN THE SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1965**

## No. 761

CARL CALVIN WESTOVER,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## OPENING BRIEF FOR THE PETITIONER

### Opinions Below

The judgment of the trial court [T.R. 96-97][1] is unreported. The opinion of the Ninth Circuit Court of Appeals [T.R. 98-106] is reported at 342 F.2d 684.[2]

---

[1] References, unless otherwise noted, are to the Transcript of Record printed for the use of this Court, which, pursuant to stipulation, contains only selected excerpts from the three-volume Record on file herein.

[2] In the printing, the final pages of the lower Court's opinion have been transposed; see T.R. 104-106; in the correct order, as the original page numbers indicate, the opinion should skip from the end of the first full paragraph on T.R. 104 to the third paragraph on T.R. 105 ["We have no reason . . . ."]; thence from the end of the carryover paragraph on T.R. 106, return to pick up the final paragraph on T.R. 104 and the first three lines on 105.

## Jurisdiction

The judgment of the Court of Appeals was entered March 11, 1965 [T.R. 106]. The petition for a writ of certiorari was filed in this Court on April 10, 1965, and was granted by order of the Court entered November 22, 1965 [T.R. 106-107]. The jurisdiction of this Court rests on Section 1254(1) of Title 28, United States Code.

## Questions Presented

1. Under this Court's recent decision in *Escobedo* v. *Illinois*, 378 U.S. 478 (1964), is it enough that a "prime-suspect" prisoner merely be "informed of his right" to consult with counsel, when he is being held *incommunicado* and without physical ability to exercise that right; or does the standard require *actual consultation* with, and the continued presence of, such counsel, prior to and during the course of the incriminatory, accusatory interrogation?

2. Under the same *Escobedo* decision, must the government, before any accusatory interrogation, actually furnish appointive counsel to a "prime-suspect" indigent, at the preliminary stage, and inform him of his right to have such counsel provided to him, as it must at the time of trial itself?

3. Is a federal prisoner's confession, secured from him between fifteen and seventeen hours after he has been taken into custody, and prior to any appearance before a Commissioner, properly admitted into evidence against him where the custody, although nominally that of the State, is in every factual particular the joint effort of both State and Federal authorities?

4. Does a defendant's failure to object, at his trial, to the admission of an incriminating piece of evidence, in the face of a then-controlling, contrary decision by the same Circuit's Court of Appeals, thereafter "not entitle" him to raise the matter on direct appeal, when in the interim, following his conviction, a decision of the Supreme Court rules such evidence constitutionally improper, as the product of unreasonable search and seizure?

5. Did reversible error occur in this case when the prosecutor, in closing argument to the jury, indulged in certain speculation on "what was in the defendant's mind" in bothering to have a trial, and thereafter stated that "the evidence is uncontradicted, and . . . you as reasonable people can infer that if evidence can be contradicted then it should be?"[3]

6. Where an indictment combines two offenses into a single, unitary count, and no proof at all is introduced as to an essential element of the greater offense, is a jury verdict of guilty on the entire count legally sustainable?

## Constitutional Provisions, Statutes and Regulations Involved

The Constitutional provisions involved are Amendments IV, V, and VI; the statutory provisions, Sections 2113(a) and 2113(d) of Title 18, United States Code; the regulation, Rule 5(a) of the Federal Rules of Criminal Procedure. All of the foregoing are set out in Appendix A hereto.

---

[3] This question is not yet properly before the Court, having been submitted by supplemental motion for leave to amend the petition, dated December 3, 1965. That motion is still pending before the Court.

## Statement of the Case

By indictment returned by the federal Grand Jury in Sacramento, California, on April 1, 1963 [T.R. 1-2], petitioner was charged with two separate counts of violation of 18 U.S.C. §§2113(a) and 2113(d), involving two robberies, the first of a savings and loan association and the second of a bank; both institutions were federally insured. Jurisdiction in the federal district court was invoked under 18 U.S.C. §3231.

a. *The Arrest and Detention*

At approximately 9:45 P.M., in the evening of March 20, 1963, petitioner was arrested just as he was entering his automobile, in Kansas City, Missouri. According to the report of the arresting officer, Detective Linhart of the Kansas City Police Department, the arrest was made both "in connection with local matters" and

> "also reports from the local F.B.I. office in Kansas City, Missouri that the man was wanted on a felony warrant from the State of California." [T.R. 35; see also 42, 44].

As a result of the arrest, a certain packet of currency was discovered which, the following day, was jointly examined by one Officer Trollope of the Kansas City Police Department and an Agent Melotte[4] of the local office of the Federal Bureau of Investigation [T.R. 50-51, 52, 57-58]. Petitioner was taken to the police station, placed in a "line-

[4] Sometimes variously "Melott" or "Mollet".

up" on one of the local charges [T.R. 40, 43-44], and subsequently booked into the Kansas City Jail "for investigation check" on the "local matters", "also possible outside warrants, California." [T.R. 43]. Shortly thereafter, the local F.B.I. office telephoned the Kansas City Police, explicitly "requesting that the subject be held for them also" [T.R. 44] "for questioning" [T.R. 44].

During the evening of the arrest and at least into the early hours of March 21, petitioner denied all knowledge of any criminal activity [T.R. 76]. However, questioning by the Kansas City police continued until shortly before noon the following day, at which point, declaring themselves "through" with their questioning, the local authorities made petitioner available to three agents of the F.B.I., for their own independent interrogation [T.R. 80, 84, 62], "in connection with these cases" [T.R. 73; see also 81].

For purposes of their questioning, the federal agents were given the use of a certain gun [T.R. 68] which the Kansas City police had, as they testified, discovered in a search of petitioner's hotel room, pursuant to a "waiver of search" signed by petitioner [T.R. 60, 68]. At some time between 2:00 and 2:30 P.M.—approximately seventeen hours after his arrest—the federal agents emerged with two "statements", or, confessions, on which petitioner's subsequent indictment and conviction were later to be based. The following day petitioner made certain factual changes in each of the two statements [T.R. 74-75].

Also at some point during the busy day of March 21, two photographs were taken of petitioner and transmitted to Sacramento, California, for the use of the F.B.I. agent in Sacramento who had overall charge of the case [T.R. 32-33]. (Approximately three weeks prior to the arrest,

this same agent had, with another set of photographs, already obtained an identification of petitioner as the perpetrator of the Fort Sutter robbery).[5]

During this entire period, petitioner had not been taken before a committing magistrate or commissioner, either federal or state.[6] Nor had he yet consulted, or had physical opportunity to consult with, an attorney, although there is the recitation in each of his statements, as transcribed by one of the interrogating federal agents, that he had been "advised of his right" to do so [T.R. 64, 66].

In the interim, petitioner's automobile, searched once at the time of the arrest and a second time in petitioner's presence at the police station, had subsequently been removed to the Police Department's storage lot [T.R. 41-42, 45-46]. There, at some time presumably during the morning of March 21, a third search was conducted jointly by Officer Trollope and F.B.I. Agent Mellotte, at which point a certain topcoat was discovered and "seized" [T.R. 56].

Petitioner's incarceration continued, while in Sacramento, California, the F.B.I. agent there made his rounds of witnesses with the two Kansas City photographs. Finally on April 1, 1963, eleven days after his arrest, and the same day that the federal indictment was returned in Sacramento, petitioner was officially released into federal custody and taken before a U.S. Commissioner in Kansas City,

---

[5] The testimony of witness Nancy Lysaght, which pinpoints this time element, was inadvertently omitted from the excerpts printed as the Transcript of Record for use of this Court; see, however, II R. 24; see also T.R. 6-8.

[6] The record does not disclose whether he was at any time thereafter, until his formal delivery into federal custody on April 1, 1963.

for the preliminary hearing (or, "arraignment") required by Rule 5(a) of the Federal Rules of Criminal Procedure [T.R. 69].

Petitioner was subsequently returned to Sacramento, in custody, to stand trial on the charges of the indictment.

b. *The Trial*

At petitioner's subsequent trial, the prosecution introduced into evidence, without objection, all of the foregoing tangible evidence—the gun [Ex. 2; T.R. 7, 61], the topcoat [Ex. 4; T.R. 17, 56], the Kansas City photographs [Ex. 9 & 11; T.R. —, 33],[7] and the two confessions [Ex. 16 & 17; T.R. 63, 64]. The prosecution also introduced written evidence and oral testimony regarding the money stolen from the two institutions, and "eye-witness testimony," of greater and lesser degrees of veracity, identifying petitioner as the robber.[8] With respect to the gun, the person mentioned in each Count of the indictment as having had his life thereby "put in jeopardy" was asked to identify the weapon. Neither had seen the entire gun, but each identified it as "appearing to be", or "resembling", the weapon which the robber had used. [T.R. 7, 17; see also 5].

Petitioner's counsel presented no witnesses of his own, but rather sought, through the unwilling mouths of three of the Kansas City officers (two City Police, one F.B.I.), to establish that, by agreement with petitioner, the local

---

[7] The printed Transcript of Record omits the portion of the record where these were first identified. In the full record it appears at II R. 39.

[8] An argument strongly pressed in both lower courts, the irregularity pertaining to the most dogmatic identification [see T.R. 103-105, 342 F.2d at 688-689], has not been carried to this Court.

charges had been dropped in return for his "cooperation" with the F.B.I.—in other words, a "deal." [T.R. 75-85; see also 70-71, 73]. Quite unsurprisingly, all three denied knowledge of any such activity. All three also denied any *personal* knowledge of whether or not the state charges had in fact been dropped [T.R. 70, 71, 78, 81], although it was conceded that the local charges had in fact never been brought to trial [T.R. 76].

During the course of his closing argument, the prosecuting attorney indulged in certain speculation, for the jury's benefit, on "what was in the defendant's mind," in bothering to be brought for trial [T.R. 86-87].* This speculation was the subject of further comment, by both counsel, thereafter [see T.R. 88-89].

In his charge to the jury, the trial judge correctly stated the controlling law as to both subsections (a) and (d) of 18 U.S.C. §2113, clearly indicating the distinct nature of the two; he also charged that, "It is essential that *each and all* of the elements" in each Count of the indictment would have to be proved, "before you will be justified in finding the defendant guilty . . . . " [see T.R. 91-99]. No exceptions or objections were taken to the charge [T.R. 94].

Following the charge and a brief recess for deliberation, the jury returned with a "guilty" verdict as to both counts [T.R. 94; 96]. Petitioner was sentenced to a fifteen-year prison term on each count, the sentences to run consecutively, thus making a total of thirty years' imprisonment [T.R. 95; 96-97].

---

* The substance of the commentary is set out hereinafter, under Argument Heading IV.

c. *The Appeal*

1. Petitioner's application for leave to appeal *in forma pauperis*, initially denied in the district court, was renewed in the Court of Appeals, and was ultimately granted by order dated September 18, 1964. Jurisdiction in that Court was provided by 28 U.S.C. §§1291 and 1294.

On the appeal, petitioner raised the matters presented here, among others, some for the first time. Notwithstanding the lack of "preservation" in the trial court, the appellate Court's consideration of the new points was urged, both as instances of "plain error" within the ambit of Rule 52(b) of the Federal Rules of Criminal Procedure,[10] and because, as to many of them, the controlling decisions had not yet been decided at the time of petitioner's trial.[11] All arguments raised were fully briefed and argued to the Court, which, insofar as its opinion discloses, considered them all.

Despite the devotion of the bulk of oral argument to petitioner's two confessions, the Court's opinion fails even to mention *Massiah* v. *United States*, 377 U.S. 201 (1964), and *Escobedo* v. *Illinois*, 378 U.S. 478 (1964). The reason for this omission must unquestionably be found in the Court's recitation of the opening words contained in each statement, that the interrogators had—

"advised the appellant that he did not have to make a statement; that any statement that he made could be

---

[10] See also *Silber* v. *United States*, 370 U.S. 717 (1962); *Gilbert* v. *United States*, 307 F.2d 322, 326 (9th Cir. 1962), *cert. denied*, 372 U.S. 969 (1963).

[11] For example, *Massiah* v. *United States*, 377 U.S. 201 (1964); *Escobedo* v. *Illinois*, 378 U.S. 478 (1964); *Preston* v. *United States*, 376 U.S. 364 (1964); also *Griffin* v. *California*, 380 U.S. 609 (1965).

used against him in a court of law; that he had the right to consult an attorney." [T.R. 99, 342 F.2d at 685].

The Court thus must be considered to have held that, notwithstanding the aggravating factor of petitioner's secret incarceration, such "advisement" was legally sufficent to satisfy the Constitutional standard set down in *Massiah* and *Escobedo.*

The opinion then held that, notwithstanding the seventeen-hour *incommunicado* incarceration, the confessions were not inadmissible for failure of prompt "arraignment" of petitioner before a committing magistrate. Noting that the custody was in the name of the State, the Court held (correctly) that the *McNabb-Upshaw-Mallory*[12] exclusionary rule, now also contained in Rule 5(a) of the Federal Rules of Criminal Procedure, had "no direct application." [T.R. 100, 342 F.2d at 686]. Then, sliding quickly over the many facts[13] pointing unmistakably to a close hand-in-glove, joint federal-state operation, the Court also refused to hold the *McNabb* rule *in*directly applicable, under authority of *McNabb's* companion case, *Anderson* v. *United States,* 318 U.S. 350 (1943). Strictly limiting *Anderson* to its specific facts, the Court found "no such abuses, nor any abuses at all", in petitioner's seventeen-plus hour pre-confession detention [T.R. 101, 342 F.2d at 687]. Rather as an afterthought, it noted that "[i]f it were relevant," Missouri had a statute which permitted an *incommunicado* detention such as petitioner's, as a matter of state law, for a period

---

[12] *McNabb* v. *United States,* 318 U.S. 332 (1943); *Upshaw* v. *United States,* 335 U.S. 410 (1948); *Mallory* v. *United States,* 354 U.S. 449 (1957).

[13] See *supra,* pp. 4-7; see also *infra,* under Argument Heading II.

of up to twenty hours;[14] petitioner's confessions[15] had come within this time-limit by about three hours.

Reaching the issue of petitioner's topcoat, taken from petitioner's automobile the day following his arrest, the Court readily conceded that the search had been a violation of the Constitution, under the standard of *Preston* v. *United States*, 376 U.S. 364 (1964), and that, as a consequence, "the topcoat should have been excluded, if its admission had been objected to." [T.R. 105, 342 F.2d at 689]. Nevertheless, accusing petitioner's trial counsel of want of "ordinary prudence" and "sabotage", the Court refused to give serious consideration to the issue, because that trial counsel had not objected to its admission at the time of the trial. In so ruling, the Court made no reference to its own 1961 decision in *Fraker* v. *United States*, 294 F.2d 859—controlling law in the Ninth Circuit at the time of petitioner's 1963 trial—in which, on facts remarkably similar to petitioner's, the same Ninth Circuit had held such a search not "unreasonable", and, as a consequence, the evidence thus obtained easily admissible. On the heels of this tongue-lashing, the Court then remarked that, in any case, it regarded the admission as "harmless error" [T.R. 104, 342 F.2d at 689-690].

The two final grounds urged here, the prosecutor's speculation and the failure of proof of the aggravated form of robbery under 18 U.S.C. §2113(d), were disposed of without comment, presumably as being among the matters concluded to have been "without merit." [T.R. 105, 342 F.2d at 690].

---

[14] Missouri Statute, Vernon's Annotated Missouri Statutes, §544.170.

[15] Disregarding any impact of the changes made in them the following day.

As a consequence of all of the foregoing, the judgment of the trial court was affirmed.

## Summary of Argument

1. *The Right to Counsel*: The right to counsel accorded to a detained prisoner at the post-arrest, pre-arraignment stage by this Court's decision in *Escobedo* v. *Illinois*, 378 U.S. 478 (1964), cannot, any more than at any other stage of the criminal proceeding, meaningfully be made to turn upon the presence or absence of a record request for counsel. The mere fact that the record shows no request does not mean that one was not made; moreover, where the right attaches at other phases of the criminal trial, it does not depend for its efficacy upon a request. By the same token, and in view of the secret nature of the incident to which the right, under *Escobedo*, now attaches, if the doctrine is to have any meaningful existence and effect, the accused must *actually see* a lawyer—not merely "be advised of his right" to see one. Problems of proof of "intelligent" waiver of the right compel such a result, which is also supported both by practical considerations and by other decisions of this Court.

Also because of the otherwise-impossible way of knowing what actually did occur in the secret interrogation-room, this Court should, for reasons of sense and law alike, hold that the *Escobedo* right includes the right to *have counsel present*, at any "focused", confession-seeking interrogation. Again, the question of waiver, of the right to remain silent, as a practical matter compels such a result. Also again, the mere "advisement" by the interrogating officers is not an adequate substitute for advice by one's own counsel; more-

over, of course, the giving of such advice is but one of many functions which a lawyer, actually present, could perform for the accused. Again, prior decisions of this Court point strongly toward such a result.

For much the same reasons, this right to counsel cannot realistically turn on whether or not the accused has already retained his own counsel, since where the right attaches it is not dependent upon either the prior retention or ability to retain one's own counsel. *Gideon* v. *Wainwright,* 372 U.S. 335 (1963). Moreover, it is the indigent class which is most in need of the protection of counsel at this point; if a "means test" is employed, the *Escobedo* right will, as a practical matter, be self-defeating, and of no value to the very persons it is most designed to aid. The "guiding hand of counsel," *Powell* v. *Alabama,* 287 U.S. 45 (1932), must, therefore, be provided by the state, even at this preliminary stage, if *Escobedo* is to be effectuated and the prisoner in fact accorded a fundamentally fair trial.

Finally, this Court should hold that, where a failure to provide counsel couples with a period of protracted secret detention, any confession thereby elicited is necessarily "the product of an overborne mind," and coerced as a matter of law.

2. *The Secret Detention*: The federal exclusionary rule of *McNabb* v. *United States,* 318 U.S. 332 (1943), would exclude confessions obtained, as here, after a seventeen-hour period of secret detention, for failure of prompt arraignment, when the detention is federal; however, the state courts generally have no similar exclusionary rule, and state officials customarily ignore, with impunity, their own states' "prompt-arraignment" statutes. At least as

a matter of federal criminal law, where a confession is obtained by federal officers, working jointly with state officers, its admissibility should be governed by federal law; hence where the prisoner has not been promptly arraigned, the confession should be excluded even though the detention be nominally that of the state. *Anderson* v. *United States*, 318 U.S. 350 (1943), should be held controlling.

3. Petitioner's trial was also marred by these additional variances, which, cumulatively if not independently, so affected the integrity of the trial as to warrant reversal of his conviction:

a. The admission into evidence of a certain topcoat, admittedly obtained in violation of the Fourth Amendment: Petitioner's counsel did not object to the admission at the trial, but petitioner himself had no reason to know the evidence was constitutionally objectionable, and indeed a closely paralleling, then-controlling decision of the Ninth Circuit gave at least strong reason to believe that any such objection would have been overruled, in any case. Although not an overwhelmingly damaging piece of evidence, the topcoat was nevertheless an important factor in establishing the eyewitness identification of petitioner as the perpetrator of one of the two robberies, and should not therefore be considered merely "harmless error."

b. Comment and speculation, by the prosecuting attorney, on why the defendant had bothered to come to trial, and upon his failure to take the witness-stand to contradict the prosecution's prima facie case: While some comment that the prosecution's evidence is uncontradicted is permissible in federal courts, the prosecution here overstepped

those permissible limits. The speculation was thoroughly unfounded, and in its mocking nature could not help but focus the jury's attention on the petitioner's failure to testify, which focus was but intensified by the later remarks. This unwarranted comment was a violation of petitioner's constitutional right to remain silent. *Griffin* v. *California*, 380 U.S. 609 (1965).

c. The joinder, in each Count of the indictment, of two separate offenses: All of the evidence produced at the trial showed only a violation of the lesser offense of robbery defined in 18 U.S.C. §2113(a); there was a complete failure of proof as to the greater offense defined in 18 U.S.C. §2113(d). Yet, because both were combined in a single Count, the jury was permitted to consider the unproven aggravating allegations, in reaching its verdict; had the offenses been separately stated in the indictment, petitioner would have been entitled to receive a directed verdict as to the greater, more emotionally-charged offense. Because of the inherent prejudice involved, such a practice of loose pleading should be discouraged as a matter of federal criminal law, notwithstanding the fact that, in this case, the sentence as actually imposed could legally have rested on a finding of guilt as to the lesser offense alone.

## ARGUMENT

### I.

### Petitioner's Two Confessions, Elicited From Him During Police Custody and After He Had Become the "Prime Suspect", in a Confession-Seeking Interrogation, Were Obtained in Violation of His Constitutional Rights to Counsel and Against Compulsory Self-Incrimination.

The great significance of this Court's 1964 decisions[16] in *Massiah* v. *United States*, 377 U.S. 201 (1964), and, more meaningfully, *Escobedo* v. *Illinois*, 378 U.S. 478 (1964), in moving the Sixth Amendment's right to "the Assistance of Counsel"[17] out of the courtroom and into the extrajudicial police interrogation processes, lies in the Court's recognition that both stages, interrogation and trial, are in reality but fractional parts of the one unified whole which is criminal law enforcement, and in the correlative recognition that the defendant is often just as much "on trial" at the earlier stage as at the later. A failure so to hold, the Court felt,

---

[16] While at least one of the companion cases to this presents a serious question as to the extent to which these decisions should be applied "retrospectively," to convictions obtained prior to their rendering, it is believed that under even the narrowest of interpretations those decisions must apply to this case, which is still in the process of direct appellate review from the conviction. *Doughty* v. *Maxwell*, 376 U.S. 202 (1964); *Pickelsimer* v. *Wainwright*, 375 U.S. 2 (1963); *Sunal* v. *Large*, 332 U.S. 174 (1947); *cf.*, *Linkletter* v. *Walker*, 381 U.S. 618 (1965).

[17] Conjoined with the Fifth Amendment's privilege against compulsory self-incrimination; see 378 U.S. at 485, 488; *Malloy* v. *Hogan*, 378 U.S. 1 (1964).

"would make the trial no more than an appeal from the interrogation; and the 'right to use counsel at the formal trial [would be] a very hollow thing [if], for all practical purposes, the conviction is already assumed by pre-trial examination' ". *Escobedo* v. *Illinois*, 378 U.S. at 487-488 (quoting from Mr. Justice Black's dissenting opinion in *Re Groban*, 352 U.S. 330, 344 (1957)).

In taking this step, the majority has rejected as mechanistic and unattuned to actual fact the formal dividing line between "investigation" and "accusation" to which the dissenting Justices would have adhered, that of the commencement of formal judicial proceedings, "by way of indictment, information, or arraignment" (378 U.S. at 493-494, dissenting opinion).[18]

Anticipating the waves of anguished protest which were predictably to arise from the law enforcement authorities, the Court stated, in *Escobedo*:

"The fact that many confessions are obtained during this period [between arrest and indictment] points up its critical nature as a 'stage when legal aid and advice' are surely needed [omitting citations]. The right to counsel would indeed be hollow if it began at a period when few confessions were obtained." 378 U.S. at 488.

---

[18] In at least one previous decision the Court had, on given facts, already advanced the constitutional right to counsel ahead in time to the preliminary hearing stage, *White* v. *Maryland*, 373 U.S. 59 (1963), thus according to that state prisoner a right which has long been recognized as a fundamental matter of federal criminal procedure. See Rules 5(b) and 44, Federal Rules of Criminal Procedure.

*Escobedo*, then, in its own words, "[struck] a balance in favor of the right of the accused," as against the confession-seeking activities of the police. *Ibid.* What remains for decision is whether the right thus granted is to be given effective and effectual implementation, or whether, conversely, it is to exist in lip-service only. It is in this choice that the instant case is presented.

In several material particulars, the predicament of the instant petitioner Westover closely parallels that of Danny Escobedo. Like Escobedo, Westover had been arrested and was, at the time his confessions were elicited, in police custody.[19] And as with Escobedo, the interrogation was unquestionably "accusatory", "its focus [was] on the accused and its purpose [was] to elicit a confession." 378 U.S. at 492.[20]

From the moment of his arrest by the Kansas City police, the federal authorities knew that "their man" had been found. At least three weeks prior to that arrest, petitioner had already been identified, in Sacramento, in connection with the Fort Sutter robbery.[21] The arresting Kansas City Police officer, Detective Linhart, unequivocally testified that petitioner's arrest had been effected partly on "local matters," but also partly on

> "reports from the local F.B.I. office in Kansas City, Missouri that the man was wanted on a felony warrant from the State of California." [T. 35]

---

[19] As distinguished from Massiah, who was, of course, free on bail at the time his confession was obtained.

[20] It is significant that California, at least, treats these two factors as alone sufficient to activate the *Escobedo* rule. (See *People* v. *Dorado*, 62 A.C. 350, 42 Cal. Rptr. 169 (1965), *cert. denied*, 381 U.S. 937 (1965).

[21] See note 5, *supra*.

Detective Linhart further testified that, shortly after petitioner's booking ["for investigation check" on the "local matters"], he had

> "received a call from Agent Dobbs of the F.B.I. office, Kansas City, Missouri, requesting that the subject be held for them also." [T. 44]

And although the officer denied knowledge, on his part, as to whether the federal hold was "in relation to any particular offense" [T. 44], F.B.I. Agent Laughlin later dispelled any doubt, acknowledging that the purpose of the federal officers' appearance at the Kansas City Jail, the day after petitioner's arrest, was quite specifically "to interview him in connection with *these cases.*" [T. 73, supplying emphasis]

Unquestionably this was not a "general investigation of an 'unsolved crime'," *Escobedo,* 378 U.S. at 485 (quoting from the concurring opinion of three Justices, per Stewart, J., in *Spano* v. *New York,* 360 U.S. 315, 327 (1959)). Rather, it was, like *Escobedo* itself, an instance where "the purpose of the interrogation was to 'get him' to confess his guilt despite his constitutional right not to do so." *Ibid.*

In certain other respects, Westover's predicament was considerably more aggravated than that of Escobedo. The latter had already obtained a lawyer and had discussed with him "what [he] should do in the event of interrogation," 378 U.S. at 485, n. 5; moreover, although prevented from speaking with him at the time of the subsequent interrogation, Escobedo was at least able to catch enough of a glimpse of his lawyer to observe a gesture which he interpreted (undoubtedly correctly) to mean that he was "not

to say anything," 378 U.S. at 480, n. 1. Finally, of course, Escobedo knew that his lawyer had already once, less than two weeks before, secured his release from police custody; by that same glimpse in the hallway he must have known that, if necessary, the lawyer could do the same again.

In contradistinction to all of the foregoing, Westover, of course, had no counsel, nor opportunity (nor funds) to retain one. Unlike Escobedo, he at no time saw a friendly face, during the seventeen-odd hours of detention up to and through the federal interrogation. Most critically, by virtue of that protracted *incommunicado* detention, with no end in sight, he, unlike Escobedo, had no reason to believe that the interrogation and secretive incarceration would not go on indefinitely, until he chose to "cooperate" with his interrogators; in his case, there was no counsel standing by, upon whom he could rely to break that detention for him. Indeed, under the circumstances of his arrest, while alighting from his car on a dark street, and his detention, without benefit of any public appearance before a magistrate, there was no one standing by at all.

In, however, one major respect, which the language of *Escobedo* indicates the Court considered significant, petitioner's predicament was—at least in theory—less compelling than Escobedo's. That is the fact that, while in *Escobedo* "no one during the course of the interrogation" had advised Escobedo "of his constitutional rights," 378 U.S. at 483, in petitioner's case there is a recitation in each of his statements that he had been "advised of" those rights.[22] It is submitted that this difference is in fact no

[22] There is also brief testimony to this same "advisement"; see T.R. 63.

more than a paper distinction,[23] legally as well as practically insufficient to command a contrary result.

While lower courts, both federal and state, are still at odds as to the necessity of even such a bare "advisement", certainly as simply a common-sense matter it would seem that, if the correlative rights to have counsel and to remain silent do exist at this point, the person entitled to them is, concomitantly, entitled to *know* of it.[24] Notwithstanding the lower courts' difficulty with this first step, however, it is believed that, far from being an outlandishly radical *maximum*, the mere "advisement" is not even adequate to effectuate the *Escobedo* standard.

A. The Fact That Petitioner Was "Advised" of His Rights by His Interrogators Does Not Make the Interrogation Lawful, Since the "Effective Right to Counsel" at This Early Stage Can Only Be Satisfied by Actual Consultation With and the Continued Presence of Counsel, Prior to and During Such Focused Interrogation

As an initial matter, it is submitted that the *Escobedo* right to "consult with" counsel at the accusatory-interrogation stage can only be satisfied by a showing of *actual* consultation with such counsel, and by that counsel's continued presence at any interrogation thereafter.[25] Any-

---

[23] See: "The Curious Confession Surrounding Escobedo v. Illinois", 32 U. Chi. L. Rev. 560 (1965), observing, in this regard, that "*Crooker* [v. *California*, 357 U.S. 433 (1958)] was distinguished" in *Escobedo* "on a fact which *Cicenia* [v. *LaGay*, 357 U.S. 504 (1958)] indicates was not material."

[24] Compare Art. 31, Uniform Code of Military Justice, 10 U.S.C. §831.

[25] See Note, 73 Yale L.J. 1000, 1041-1044 (1964); Comment, 53 Cal. L. Rev. 337 (1965).

thing less, it would seem, defeats the right before it ever really comes into being.

Petitioner's predicament here indicates quite clearly the practical need for an actual-consultation requirement. Although his two confessions recite that he was "advised that I have a right to consult an attorney," the record is bare of any showing on whether or not he *asked to exercise* that right. The federal interrogators called as witnesses did not (quite obviously) state that such a request had been made; on the other hand, they carefully avoided saying it had not. And certainly as a rational matter, if the carefully-worded, *pro forma* advisement was in fact ever brought meaningfully home to petitioner,[26] it strains credibility to believe that he did not seek to avail himself of it. Particularly in view of petitioner's election to stand mute at his trial,[27] the mere absence of record evidence to such a request most assuredly does not mean that none was in fact made. See, e.g., *Carnley* v. *Cochran*, 369 U.S. 506, 516-517 (1962); *Crooker* v. *California*, 357 U.S. 433, 477-478 (1958) (dissenting opinion).

It must be remembered that at the time the interrogation began petitioner had already been in secret detention for over fifteen hours, completely shielded from outside help. Under these circumstances the practical *opportunity to exercise* his "right" to counsel[28] rested wholly on the

---

[26] Cf., *Haley* v. *Ohio*, 332 U.S. 596, 601 (1948), rejecting another prisoner's signed confession, containing a similar acknowledgment of "advisement", with the terse but realistic comment that, "we cannot give any weight to recitals which merely formalize constitutional requirements." See also *Haynes* v. *Washington*, 373 U.S. 503, 512-513 (1963); Comment, 53 Cal. L. Rev. 337, 335 (1965).

[27] Itself, of course, a constitutional right.

[28] Compare Rule 5(b), Federal Rules of Criminal Procedure.

whim of his captors and interrogators—the very persons least interested in granting it.[29] Moreover, notwithstanding his theoretical right to remain silent, as a practical matter petitioner was most surely in the position where,

> "because his commitment to custody seem[ed] to be at the will of his questioners, he [had] every reason to believe that he [would] be held and interrogated until he [spoke]." *Culombe* v. *Connecticut*, 367 U.S. 568, 575 (1961) (Opinion of Frankfurter, J.); see also *Haynes* v. *Washington*, 373 U.S. 503, 514 (1963).

This points up the impossible dilemma which anything short of actual consultation necessarily poses. Even though (and certain language in *Escobedo* notwithstanding) the right to counsel cannot seriously be made to turn on the presence or absence of a request, cf., *Carnley* v. *Cochran*, 369 U.S. 506, 513 (1962), and cases cited; see also *Uveges* v. *Pennsylvania*, 335 U.S. 437 (1948), and Mr. Justice White's dissent in *Escobedo* itself, 378 U.S. at 495,[30] nevertheless assume such a request is made, and ignored—what hope has the accused of proving it? When the accused takes the stand and testifies one way, and the only other participants, his interrogators—law-abiding citizens all—testify to the reverse, which is the jury certain to believe?[31]

---

[29] See *Culombe* v. *Connecticut*, 367 U.S. 568, 641 (1961) (opinion of Douglas, J.).

[30] See also *People* v. *Dorado*, 62 A.C. 350, 363, 42 Cal. Rptr. 169 (1965), *cert. denied*, 381 U.S. 937 (1965); *U.S. ex rel. Russo* v. *New Jersey*, 351 F.2d 429, 437-438 (3d Cir. 1965); Comment, 53 Cal. L. Rev. 337, 361 (1965).

[31] See *Culombe* v. *Connecticut*, 367 U.S. 568, 573-575 (1961) (separate opinion of Frankfurter, J.); *Re Groban*, 352 U.S. 330, 340-343 (1957) (dissenting opinion); *Crooker* v. *California*, 357

Heretofore when the right to counsel has been deemed to attach, whether at the time of trial or at some point preliminary thereto, it has at least been in an open, public proceeding, before an unbiased arbiter, the judge or committing magistrate. Hence any waiver of that right to legal representation, by the accused, has necessarily occurred in the presence of at least one disinterested third party, with no stake in the venture, who could, if called upon, testify to the degree of "intelligence" and "competence" of the waiver. *Johnson* v. *Zerbst,* 304 U.S. 458 (1938); *Walker* v. *Johnson,* 312 U.S. 275 (1944). Indeed, at least as a matter of federal law the judge must, under constitutional compulsion, go even further. It is his "solemn duty" to an unrepresented defendant "to make a thorough inquiry and to take all steps necessary to insure the fullest protection of this constitutional right [to counsel] at every stage of the proceedings." *Von Moltke* v. *Gillies,* 332 U.S. 708, 722 (1948) (opinion of Black, J.):

> "A judge can make certain that an accused's professed waiver of counsel is understandably and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered." *Id.* at 724. See also *Cherrie* v. *United States,* 179 F.2d 94, 96 (10th Cir. 1949).

It should be obvious that the "advisement" behind closed police doors cannot, even where given in the best of faith, even begin to approach this sort of protection—to which,

---

U.S. 433, 444-445 (1958) (dissenting opinion); Pope, Address at the Conference of the Ninth Judicial Circuit, 33 F.R.D. 409, 419 (1962); Note, 78 Harv. L. Rev. 426, 431 (1964); Comment, 53 Cal. L. Rev. 337, 351 (1965).

however, this Court has declared the accused constitutionally entitled.[32]

By the same token, of course, the mere fact that an accused did ultimately sign a confession is not of itself of any particularly probative value toward showing an "intelligent and knowing waiver", any more than it is a trustworthy indicator of the confession's voluntariness. Compare *Haynes* v. *Washington*, 373 U.S. 503 at 512-513. As one court has put it:

> "It is internally illogical to presume a waiver of the right to have counsel from an act which can only be intelligently exercised with the aid of counsel." *Wright* v. *Dickson*, 336 F.2d 878, 883 (9th Cir. 1964).[33]

Certainly this should be so, here as in *Haynes*, where the confession is elicited only after a lengthy, incommunicado detention—as the price, perhaps, for lifting the blanket of secrecy.

Finally, it would seem that, similarly as a logical matter, the right to counsel is of such vital importance to an accused that it itself should not permissibly be waivable *except on advice of counsel*. If, as it seems to be,[34] the

---

[32] Nor, quite obviously, can such procedure satisfy the federal-court requirement that the facts of any such waiver be spread on the record. *Johnson* v. *Zerbst*, 304 U.S. 458 (1938); *Glasser* v. *United States*, 315 U.S. 60 (1941). Nor, yet again, does the "essential presumption of regularity which attaches to judicial proceedings," *Von Moltke*, *supra*, 332 U.S. at 737 (dissenting opinion), have any applicability to the police interrogation chambers.

[33] Citing from Note, 31 U. Chi. L. Rev. 591, 601 (1964).

[34] "[I]t is obvious that the 'guiding hand of counsel,' 378 U.S. at 486, is seen by the Court to be most needed to insure that the defendant does not unwittingly waive his right to remain silent." Comment, 53 Cal. L. Rev. 337, 345-346, n. 50 (1965).

rationale of *Escobedo* is to prevent the unknowing relinquishment by an accused of his constitutional guarantees, it makes no sense at all to say that this perhaps most valuable constitutional guarantee does not deserve at least the same degree of protection.

For much the same reasoning, it follows that the second fundamental right of an accused, that of remaining silent in the face of interrogation, can similarly be adequately preserved only by the *actual presence* of counsel during all such confession-seeking interrogations. An "advisement" by the interrogating, adversary officers cannot realistically even begin to approximate the worth of the same advice when given by the accused's own counsel. Again in the words of the lead opinion from *Von Moltke* v. *Gillies, supra,*

> "The Constitution does not contemplate that prisoners shall be dependent upon government agents for legal counsel and aid, however conscientious and able those agents may be." 332 U.S. at 725.

A recent commentator has put it more laconically:

> "It is, of course, somewhat of an anomaly to rely upon the police to warn the accused to remain silent when their job will become more difficult if he elects to exercise this privilege." Comment, 53, Cal. L. Rev. 337, 350 (1965).[35]

It is, then, as a matter of constitutional law, in the first instance, that it is urged that the actual presence of counsel,

---

[35] See also the same Comment at 350-351; compare also the observation in Note, 78 Harv. L. Rev. 426, 429 (1964), that "even when warning is given [by the police], it is generally perfunctory."

during all confession-seeking interrogation, should be required.[36] As a matter of simple practicality, however, such an explicit ruling would also be highly desirable. Inasmuch as waiver—presumably, either of the right to counsel or of the right to remain silent—is necessarily always a question of fact, the defendant is concomitantly entitled to a hearing on the question. *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938); *Rice* v. *Olson*, 324 U.S. 786 (1945); *Townsend* v. *Sain*, 372 U.S. 293 (1963); *Jackson* v. *Denno*, 378 U.S. 368, 392 (1964). On the other hand, lest in his effort to preserve one constitutional right the defendant unwarrantedly be forced to surrender still another, the right to remain silent, such hearing must, in all fairness, be held independently of the trial in chief. See *Jackson* v. *Denno*, 378 U.S. 368 (1964); Note, 78 Harv. L. Rev. 426, 433-435 (1964). It would necessarily follow from this that, unless defense counsel (or, perhaps, for this purpose, some independent third party) is actually present at the time a confession is in fact made, the issue of "intelligent and knowing waiver" will invariably be raisable at the later trial—necessitating the holding of a second hearing. Certainly this doubling of efforts is to be avoided, if any other way is reasonably open. While the specific dual-hearing requirement of *Jackson* v. *Denno, supra*, on coerced confessions, may have only moderately widespread application, the same requirement applied to the issue of waiver would, it would seem, arise in almost limitless numbers of cases—in every case, at least, in which the enforcement authorities were successful in obtaining anything of use to them—that is to say, something prejudicial to the accused. Making the right to counsel's

[36] See "The Supreme Court, 1963 Term," 78 Harv. L. Rev. 143, 220-221 (1964).

presence a flat requirement would, from this standpoint, ease the burden not only on the judiciary but on the law enforcement authorities as well, by foreclosing this time-consuming avenue of attack.

It would appear, moreover, that the *Escobedo* decision itself, on its own facts, supports the result here urged. Danny Escobedo had, as both Court and dissent acknowledged, already been advised to make no statement to his interrogators, by his *own counsel.* Hence he had *already* had "consultation", and had *already* been advised of his right to remain silent. Had his request to see his counsel been granted, there is nothing more that that counsel could have told him, if another "consultation" were all that the decision required. He had already had all the assistance counsel could give him, *except actual presence during the interrogation process itself.* This, alone, he was denied—and his conviction was set aside.[37]

Moreover, as a number of recent decisions of this Court, including *Escobedo,* have recognized, the vital functions which counsel can (indeed, often must) perform at this early, pre-trial stage, in the protection of the accused's interests, go far beyond merely advising against the improvident waiver of the privilege against self-incrimination. *White* v. *Maryland,* 373 U.S. 59 (1963); *Gallegos* v. *Colorado,* 370 U.S. 49 (1962), *rehearing denied,* 370 U.S. 965 (1962); *Hamilton* v. *Alabama,* 368 U.S. 52 (1961); *Spano* v. *New York,* 360 U.S. 315, 324-326, 326-327 (1959) (concurring opinions of Douglas, J., and Stewart, J.). Quite

---

[37] Note also that Massiah (*Massiah* v. *United States,* 377 U.S. 201 (1964)) was, at the time his statements were elicited, quite free to "consult" counsel at will.

patently the actual and continuing presence of counsel is necessary for such steps as these.[38]

Moreover, although the *Escobedo* decision was limited to "the circumstances here," it is submitted that, in assessing those "circumstances" in other cases to follow (including the instant one), the Court should not allow itself to be led back down the troublous path of *Betts* v. *Brady*.[39] That is, while the degree of the focused interrogation and/or the type or degree of detention may legitimately form bases for affording the right to counsel in one case and withholding it in another, it is only these *temporal* considerations which should control. *Post hoc* distinctions based upon the particular "need" for counsel—i.e., what his tangible presence would have added—would put the Court back into the awkward position of evaluating the merit of legal steps which might have been, but never were, taken, and legal arguments which might have been, but never were, raised.[40] The evolutionary process which led to the repudiation of the discredited *Betts* "special circumstances" rule, in *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), evidenced a recognition by the Court—

> "that the mere existence of a serious criminal charge constituted in itself special circumstances requiring the

---

[38] See "The Supreme Court, 1963 Term," 78 Harv. L. Rev. 143, 221 (1964).

[39] 316 U.S. 455 (1942), overruled by *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), all Justices concurring.

[40] From this, one would assume that the "special circumstances" rule of *Betts* v. *Brady* in fact operated most severely against those who needed protection most—those whose cases, conducted without the aid of counsel, failed even to muster a point of sufficient interest to catch a judge's eye.

services of counsel at trial." *Gideon* v. *Wainwright*, 372 U.S. at 351 (1963) (concurring opinion of Harlan, J.).

Having discarded *Betts* as "no longer a reality" (to the degree it ever was), insofar as concerns the right to counsel at the time of trial, the Court is most strongly urged not to reintroduce it at the earlier, pre-trial point.

Insofar as the securing of confessions themselves is concerned, the very resistance of the nation's law enforcement agencies to the *Escobedo* principle is, itself, as the Court recognized, a compelling argument precisely for the crucial *need for* the *Escobedo* protection. As the Court knows, there is more than one way to skin a cat, and there are countless ways to extract a confession, so that it is something less than the product of a free mind, which manage to stay just within the boundaries of judicially censurable —or perhaps more accurately, judicially discoverable— coercion. See *Haynes* v. *Washington*, 373 U.S. 503 (1963); *Gallegos* v. *Colorado*, 370 U.S. 49 (1962); *Culombe* v. *Connecticut*, 367 U.S. 568 (1961). If indeed all confessions now admitted into evidence as "voluntary" were *in fact* voluntary, born out of a sense of remorseful conscience and a desire to "make a clean breast of it," authoritarian interrogators would have nothing to fear from defense counsel's presence at the questioning. It is only the unprovably coerced confessions[41] which would be deterred by such presence. And a strong argument can be made that our system of justice is just as well off without them. See *Escobedo* v. *Illinois*, 378 U.S. at 488-490; see also Report of the At-

[41] Such as petitioner tried—unsuccessfully—to establish at his own trial, out of the expectedly unhelpful mouths of his very interrogators.

torney General's Committee on Poverty and the Administration of Federal Criminal Justice (1963), 10-11, quoted in *Escobedo* at 490, n. 13.[42]

This Court over two decades ago recognized that the "Assistance of Counsel" is effective only where the accused is afforded a *reasonable opportunity* to consult with counsel. *House* v. *Mayo,* 324 U.S. 42 (1945); *Hawk* v. *Olson,* 326 U.S. 271 (1945); see also *Powell* v. *Alabama,* 287 U.S. 45 (1932). Recognizing the practical aspect of "*un*reasonable opportunities" which exist under secret-custody conditions, it is urged that the Court make *Escobedo* viable by holding that nothing less than *actual consultation,* prior to interrogation, will suffice.

B. The Same Principles Which Accord to an Accused the Right to Appointed Counsel at the Time of Trial Similarly Require That Counsel to Be Appointed for an Indigent Accused at the Focused-Interrogation Stage

What has gone before should indicate the compulsion behind the corollary principle, that if counsel is required at the preliminary, focused-interrogation stage, it should and must be equally available to all. The only logical output of this is that, even at this preliminary stage, where the accused is financially unable to provide his own counsel, the state must provide it for him.

The keystone of the *Massiah-Escobedo* doctrine is the belief that the confession-seeking interrogation period is often the single most important point in the entire criminal

[42] See also Comment, 53 Cal. L. Rev. 337, 351-352 (1965).

proceeding which follows on it, and, accordingly, that to withhold the right to counsel at this crucial point "might deny a defendant 'effective representation by counsel at the only stage where legal aid and advice would help him.'" *Massiah* v. *United States*, 377 U.S. 201, 204 (1964); *Escobedo* v. *Illinois*, 378 U.S. 478, 484-485 (1964).

In enforcing the constitutional right of a defendant to the "Assistance of Counsel," at the time of the trial itself, this Court in *Powell* v. *Alabama*, 287 U.S. 45 (1932), early declared that the failure of the state, in that case, to appoint counsel for the defendant constituted of and by itself a denial of due process. After the stormy years of "special circumstances," this Court in *Gideon* v. *Waimcright*, 372 U.S. 335 (1963), declared that right to have appointive counsel to be one of the "fundamental principles of liberty and justice" (372 U.S. at 341), "essential to a fair trial" (372 U.S. at 342), overruling the ambiguous, sliding-scale and often inequitable *Betts* v. *Brady*."

This right to appointive counsel has also long been available, as a matter of law, to indigent federal prisoners at stages prior to the trial proper, Rules 5(b), 44, Federal Rules of Criminal Procedure, and has recently been extended to periods both forward and back of the trial as a matter of constitutional necessity. *Hamilton* v. *Alabama*, 368 U.S. 52 (1961); *White* v. *Maryland*, 373 U.S. 59 (1963); *Douglas* v. *California*, 372 U.S. 353 (1963).

It is common knowledge that the indigent prisoner is the one who most bears the brunt of police activities such as the sort of secret detention for purposes of confession employed in the instant case; see *Culombe* v. *Connecticut*,

---

[43] 316 U.S. 455 (1942).

367 U.S. 568, 640 (1961) (opinion of Douglas, J.). These, then, are the ones it is intended that *Escobedo* should benefit most.[44] Yet if the *Escobedo* decision is, as a practical matter, to have any efficacy for them,[45] it will require a firm announcement by this Court that the right to counsel means, at the pretrial, interrogatory stage just as at all other stages, the right *to counsel.* The mandate of *Gideon* v. *Wainwright, supra,* must be carried back in time, lest indigent defendants, "in truth, though not in form, [be] refused the aid of counsel." *Palko* v. *Connecticut,* 302 U.S. 319, 327 (1937).

Petitioner's case is an excellent example of this practical necessity. For the bare "advisement" of a "right to consult an attorney" is, as a practical matter, meaningless, and apt to go unexercised simply by default, unless there is in fact —and the accused is *informed* of the fact[46]—an attorney who can be made available for him *to* consult.

This is not, of course, to urge that appointive counsel must be provided at every stage of police investigation into

---

[44] "The arrival of an attorney is a specific against these proscribed practices." *Culombe* v. *Connecticut, supra,* 367 U.S. at 640.

[45] As reported in the New York Times, "[W]hile enforcement officials generally do not like the Escobedo decision, they feel they can live with it since relatively few suspects have lawyers, or the means to hire them, at the time they are arrested." [!] N.Y. Times, Feb. 19, 1965, p. 24, col. 1.

See also the Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice (1963), at 16, reporting that approximately 60% of those accused of felonies in the United States are financially unable to retain their own counsel.

[46] The right to have counsel appointed, just as much as the right to have counsel at all, cannot meaningfully hinge upon a request. *Uveges* v. *Pennsylvania,* 335 U.S. 437, 441 (1948); *Rice* v. *Olson,* 324 U.S. 786, 788 (1945).

crime. It should not be necessary that "police cars [be] equipped with public defenders," 378 U.S. at 496 (dissenting opinion); by the same token, however, it should impose no great hardship to require that *jails* be so equipped.[47] Once the temporal conditions of *Escobedo* have been met—the accused in custody and the interrogation directed toward eliciting a confession[48]—it seems only fundamental fairness that, at this adversary stage,[49] the accused be accorded a measure of protection at least moderately commensurate with the force of his adversaries' position.[50] It is, after all, that point of *custody* which deprives the accused of his most effective defense against self-incrimination—the freedom simply to *walk away*.

In *Powell* v. *Alabama*, *supra*, 287 U.S. at 69, this Court stated that an accused "requires the guiding hand of counsel at every step in the proceedings against him." To the degree that *Escobedo* has recognized the pre-trial interrogatory stage as a highly important first step in those proceedings, it would seem inevitable that the *Powell* relief, of

---

[47] They appear, at least in some states, already to be effectively equipped with public *prosecutors*. Witness, for example, the New York practice of calling upon the prosecuting attorney, at the focused-interrogation point, to direct the progress of the interrogation. See the petition for certiorari filed in No. 760 herein, *Vignera* v. *New York*, at 10; N.Y. Times, Jan. 28, 1965, p. 1, col. 5, p. 17, col. 6.

[48] See "The Supreme Court, 1963 Term" 78 Harv. L. Rev. 143, 220-221, 223 (1964).

[49] See *Gideon* v. *Wainwright*, 372 U.S. at 344.

[50] See note 47. And while the federal practice does not generally follow the New York, it is generally recognized that agents of the Federal Bureau of Investigation are among the most skillful interrogators, as well as investigators, in the whole field of law enforcement.

appointment of counsel, should attach with equal force at that early point. *Gideon* v. *Wainwright, supra; Griffin* v. *Illinois,* 351 U.S. 12 (1956); see also *Escobedo* v. *Illinois,* 378 U.S. at 495 (dissenting opinion).[51] The same reasoning which led to the *Gideon* guarantee at the time of trial should vouchsafe that same relief—like *Gideon,* as a matter of course—at the crucial earlier point.

C. The Court Should Hold Confessions Obtained, as Here, Without Benefit of Counsel and by Means of Secret Detention, Coerced as a Matter of Law

Although petitioner did not testify at his trial, so that the precise circumstances surrounding the giving of his confessions cannot at this point be known, it is submitted that the Court should hold that any confession elicited under these circumstances is necessarily coerced, as a matter of law—thus bringing doctrine in line with what must surely be fact.[52]

Petitioner had, as noted, been in secret detention for over fifteen hours, when the federal agents commenced their interrogation. At and after the time of his arrest he had denied all criminal activity; yet before the federal agents had finished their interrogation he had spread a complete and detailed confession, of each crime, on the record.

Although the Court still relies upon an evaluation of "the totality of circumstances," *Gallegos* v. *Colorado,* 370

---

[51] See also "The Curious Confusion Surrounding Escobedo v. Illinois," 32 U. Chi. L. Rev. 560, 580 (1965); Comment, 53 Cal. L. Rev. 337, 355 (1965).

[52] Cf., *Watts* v. *Indiana,* 338 U.S. 49, 52 (1949), suggesting that, "There comes a point when this Court should not be ignorant as judges of what we know as men;" see also 338 U.S. at 57 (dissenting opinion of Douglas, J.).

U.S. 49 (1962), it is submitted that the two fundamental circumstances presented here—protracted, under-wraps detention and unavailability of legal counsel—are so vital that, with their confluence, the prisoner has necessarily been deprived of due process, and his confessions secured—at least, in absence of a strong record showing to the contrary[53]—involuntarily.

As early as *Bram* v. *United States*, 168 U.S. 532, 542-543 (1897), this Court recognized that:

> "A confession, in order to be admissible, must be free and voluntary; that is, it must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence."

Quite recently, albeit in a quite different factual setting, this Court stated that the Constitution forbade:

> "the States [a fortiori, the federal government] to resort to imprisonment to compel him to answer questions which might incriminate him." *Malloy* v. *Hogan*, 378 U.S. 1, 8 (1964)

As *Malloy* noted, at 7,

> "We have held inadmissible even a confession secured by so mild a whip as the refusal, under certain circumstances, to allow a suspect to call his wife until he confessed. Haynes v. Washington, 373 U.S. 503 [(1963)]"

---

[53] Cf., *People* v. *Stewart*, 62 A.C. 597, 43 Cal. Rptr. 201 (1965), *cert. granted*, Dec. 6, 1965, as this Court's No. 584, scheduled to be heard in conjunction with the instant case.

The inherently coercive nature of an *incommunicado* detention, without apparent end (except, of course, by way of confession) makes such detention, in absence of counsel or at least *some* outside aid, indeed "the breeding grounds for coerced confessions," *United States* v. *Carignan,* 342 U.S. 36, 46 (1951) (Douglas, J., concurring). Certainly in these circumstances it must be obvious that the accused has no "free choice to admit, to deny, or to refuse to answer." *Lisenba* v. *California,* 314 U.S. 219, 241 (1941).

In light of the new importance given to the right of counsel in this early, pretrial stage, in *Escobedo,* it is believed that the gap is virtually closed. In recognition of the impossible burden of proof otherwise placed on the defendant,[54] the Court should make the closure explicit.

## II.

**Petitioner's Two Confessions, Elicited From Him Approximately Seventeen Hours After His Arrest and Before Any Appearance Before a Committing Magistrate, Were Admitted Into Evidence in Violation of the Federal Exclusionary Rule, if Not of the Constitution; That the Detention Was Nominally That of the State Is Vitiated by Facts Showing the Arrangement to Have Been a Joint Operation, at Least Equally as Much for the Benefit of Federal as for the State Authorities.**

In *Culombe* v. *Connecticut,* 367 U.S. 568 (1961), Mr. Justice Frankfurter, observing that the interrogation process had become a hallmark of United States law enforcement procedure, noted also that "detention for purposes of interrogation [is] a common, although generally unlawful

---

[54] See *supra,* under heading I-A.

practice." At 572-573. He noted that, although most states had a "prompt-arraignment" statute of some sort (similar to Rule 5(a), F. R. Crim. P.), the statute was generally ignored, and that, notwithstanding, the states had not followed the federal lead in establishing an exclusionary rule based upon the failure of prompt arraignment. *Id.* at 600.

The reports of state criminal cases reviewed in this Court demonstrate with unmistakable clarity just how widespread the practice is; there scarcely comes to this Court a state conviction involving the use of a confession which does not also involve a violation of the state's own law on prompt arraignment.[55] Two of the companion cases to the instant one are still further examples: *Vignera* v. *New York*, No. 760; *Johnson & Cassidy* v. *New Jersey*, No. 762.

The instant case presents the same problem, from a federal point of view, but with an additional wrinkle: The State of Missouri, in whose nominal custody petitioner was being held, has a statute permitting "*un*prompt" arraignment—allowing to its arresting authorities a liberal twenty hours for secret interrogation prior to preliminary hearing before a magistrate.[56]

It is anticipated that, in view of the inherently abusive nature of the *incommunicado* interrogation process, as well

---

[55] See, for but recent examples, *Haynes* v. *Washington*, 373 U.S. 503 (1963); *Townsend* v. *Sain*, 372 U.S. 293 (1963); *Gallegos* v. *Colorado*, 370 U.S. 49 (1962); see also the cases cited in *Culombe* v. *Connecticut*, *supra*, at 591-592, and, of course, *Culombe* itself.

[56] Missouri Statute, Vernon's Annotated Missouri Statutes, §544.170. Even this indulgent rule is characteristically ignored; see *United States* v. *Tupper*, 168 F.Supp. 907 (W.D. Mo. 1958); see also Missouri cases cited, *Culombe* v. *Connecticut*, *supra*.

as its astounding rampancy, certain of the other petitioners may urge the Court to follow its own lead in the analogous *Mapp* v. *Ohio,* 367 U.S. 643 (1961), and to expand the federal exclusionary rule to one of constitutional proportions.[57] If this were done, it would seem Missouri's twenty-hour rule would necessarily also tumble, and consequently, of course, this petitioner, too, would welcome such a result.

It is, however, not necessary to go so far, for purposes of this case, since, being a federal case, it can (and should) be handled by the Court in its supervisory role at the apex of the federal-court structure. See *Cicenia* v. *LaGay,* 357 U.S. 504, 508-509 (1958). What *is* necessary, however, is to retrieve the federal exclusionary doctrine from the antiquated and emasculating posture to which the Ninth Circuit's decision here has relegated it.

It is clear beyond question that, had the detention in this case been solely federal, the two confessions would have been inadmissible as a matter of law, without regard to questions either of voluntariness or veracity. *McNabb* v. *United States,* 318 U.S. 332 (1943); *Upshaw* v. *United States,* 335 U.S. 410 (1948); *Mallory* v. *United States,* 354 U.S. 449 (1957).[58]

The *McNabb-Upshaw-Mallory* exclusionary rule is not based upon a showing of force or coercion; rather, its focused purpose is "to check resort by officers to 'secret interrogation of persons accused of crime.'" *Upshaw, supra,* 335 U.S. at 412-413 (quoting from *McNabb).*

---

[57] As, after a fashion, petitioner has urged, in part I-C, *supra.* See *Reck* v. *Pate,* 367 U.S. 433, 448 (1961) (Douglas, J., concurring).

[58] Now largely codified in Rule 5(a), Federal Rules of Criminal Procedure.

On the reasonable theory that federal authorities should not be allowed to accomplish indirectly what federal law forbade to them directly,[59] this Court, in a companion case to *McNabb*, applied the same exclusionary doctrine to a case in which the detention, although nominally that of the state, was in fact at the behest and largely for the benefit of the federal authorities. *Anderson* v. *United States*, 318 U.S. 350 (1943). Notwithstanding their common origin, however, the development of the *Anderson* doctrine has remained almost dormant, in contradistinction to the mainstream doctrine of *McNabb*. Perhaps because of its nonconstitutional stature, federal courts are loathe to exclude a confession obtained by federal officers but during state incarceration, even incarceration beyond the permissible limits of the state's own "prompt arraignment" laws. See, for example, *United States* v. *Coppola*, 281 F.2d 340 (2nd Cir. 1960), *aff'd*, 365 U.S. 762 (1961), and cases cited, note 55, *supra*.

At least one court, however, in applying the *Anderson* rule, described it thus:

> "It has long been a rule in respect to federal criminal prosecutions, that where a federal officer participates officially with state officers in an *arrest, detention, or search,* so that *in substance and effect it is their joint operation,* the legality of the arrest, detention, and search *is to be measured and determined by federal law and the fruits thereof cannot be used in evidence in a federal prosecution* as it is deemed to be the under-

[59] Compare the similar philosophy in the development of the exclusionary rule regarding unlawfully seized tangible evidence, prior to *Mapp* v. *Ohio*, 367 U.S. 643 (1961), more fully discussed hereinafter.

taking exclusively of the federal officers." *United States* v. *Tupper*, 168 F.Supp. 907, 910 (W.D.Mo. 1958) (Emphasis supplied).

The same law was stated by the Second Circuit in *United States* v. *Coppola, supra,* although a majority of that Court, sitting en banc, found the doctrine not to apply to the facts of the case before it. The Court stated, however:

> "If this cooperation [between federal and state authorities] reached the point of arrest and detention by local police for the purpose of enabling federal officers to question the defendants concerning the bank robberies *for a period of time forbidden to federal officers by Rule 5(a)* of the Federal Rules of Criminal Procedure, admissions thus obtained would properly be excluded. Such a rule *prevents federal officers from evading the letter and the spirit of Rule 5(a).*" 281 F.2d at 344 (Emphasis supplied).

The facts of the instant case most unmistakably show the "joint-operation" nature of petitioner's arrest and detention, in each minute particular. This was not a case where the federal authorities were simply the passive recipients of the state's long, undercover incarceration; to the contrary, the federal interests were an instrumental, operative force in actively fomenting that detention.

The arresting Officer Linhart, of the Kansas City police, testified that:

> "The arrest was affected in connection with local matters, also reports from the local F.B.I. office in Kansas City, Missouri that the man was wanted on a felony warrant from the State of California." [T.R. 35].

Again, he testified that:

> "[A]t the time of his [petitioner's] booking the [arrest] report read that he was held for the Kansas City, Missouri police department and the F.B.I." [T.R. 42].

Still a third time, asked whether it was not true that the federal request had occurred after rather than prior to his booking, Officer Linhart stated:

> "It is on my original report here." [T.R. 42]

The second stage, the tangible hold itself, continued the joint, cooperative federal-state effort. The original booking sheet showed that petitioner had been:

> "Booked for investigation check in connection with [two local hold-ups] . . . . Also possible outside warrants, California." [T.R. 43]

More conclusively, Officer Linhart testified that:

> "Following the man's booking I received a call from Agent Dobbs of the F.B.I. office, Kansas City, Missouri, requesting that the subject *be held for them also.*" [T.R. 44; emphasis supplied].

Virtually every detail of the activities during petitioner's incarceration over the next day and a half until his confessions (and, indeed, thereafter) overwhelmingly chronicle the joint-custody aspect of the detention, and the clear interest of federal as well as state authorities in perpetuating that detention, *incommunicado.* The third, and unconstitutional, search of petitioner's automobile, when the topcoat was seized, was conducted jointly by Kansas City

Officer Trollope and F.B.I. Agent Mellotte. [T.R. 56]. The same two individuals together conducted the elaborate and extensive examination and comparison of the money taken from petitioner at the time of his arrest. [T.R. 37, 50-52]. Moreover, the gun which the Kansas City officers found in petitioner's hotel room was given to the federal agents for use in their interrogation of petitioner on the two federal crimes. [T.R. 68].

Finally, it was during this same day of March 21, 1963, that the two photographs were taken of petitioner and promptly mailed back to F.B.I. Agent Miller, in Sacramento, California, for his use in interviewing the witnesses to the Bank of America robbery. [T.R. 32-33]; significantly, the state detention continued, even after the obtaining of the two confessions, the gun, and the currency, while Agent Miller made the rounds of those interviews, to and including the very date, more than a week later, that the federal indictment was returned [T.R. 69].

That the state hold-up charges were ultimately dismissed can only be inferred from the record testimony; by the same token, however, it seems an inevitable inference. All of the prosecution's witnesses brought from Kansas City alleged a convenient lack of knowledge as to the disposition of those charges—at least, *"personal"* knowledge.[60] What the record does affirmatively establish is that, in any case, the Missouri charge (or charges) which, together with the federal "warrants", formed the basis for petitioner's arrest,

---

[60] At least one of the Kansas City officers admitted that, "based on what somebody told me, I feel I know, but in response to" the Judge's instruction, requiring first-hand knowledge, stated, "well, no; in that case, no." [T.R. 70].

"has never been called to trial in the State of Missouri." [T.R. 76]. Finally, in view of the transfer of custody, it cannot be doubted but that all local charges were dropped.

Particularly in view of the limited showing on the instant record, the case of *United States* v. *Tupper*, 168 F. Supp. 907 (W.D. Mo. 1958), is of strikingly illuminating interest. That case, exactly as petitioner's, involved the *same* Kansas City, Missouri, Police Department, *the same* Kansas City office of the Federal Bureau of Investigation, and *the same* close "working arrangement" between the two. In language applying with remarkable force and pertinence to the instant case, the *Tupper* court found as follows:

> "It is Sgt. [of the Kansas City, Missouri Police] Graham's testimony that the Kansas City Police Officers cooperate with the Federal Bureau of Investigation as much as possible .... It is not the general practice of the Kansas City, Missouri, Police Department to file a lesser state charge against an arresting suspect when he is also suspected of committing a greater, federal offense. The Kansas City Police Officers consider a federal charge to be greater than a state charge, and suspects of federal offenses are customarily released to the jurisdiction of federal officers for prosecution thereon." 168 F.Supp. at 908.

On the basis of these and other facts developed in that case, that Court ruled:

> "Where a customary practice is established that local officers invariably release accused prisoners arrested by them to federal officers for prosecution, and no state charge is generally made against such accused, state-

ments and confessions taken under such circumstances clearly fall within the ambit of Rule 5(a), Federal Rules of Criminal Procedure. Anderson v. United States, supra." 168 F.Supp. at 911.

The confessions obtained in that case were, accordingly, held inadmissible.

In the instant case, however, the lower Court refused to apply *Anderson,* stating as follows:

> "The Supreme Court did not, of course, condemn working arrangements between federal and state law enforcement officers. It condemned the kind of working arrangement revealed in Anderson, 'which made possible the abuses' which there occurred.
>
> "In the instant record we find no such abuses, nor any abuses at all." [T.R. 101, 342 F.2d at 687].

In part, the Ninth Circuit was in error factually, in its recitation that the F.B.I. "had no evidence against him until it received his confessions." *Ibid.* As previously noted, petitioner had already been identified in connection with the earlier of the two robberies; moreover, the record evidence of the clear federal interest in the arrest and detention, as well as F.B.I. Agent Laughlin's testimony that "we were just there to interview him in connection with these cases" [T.R. 73], quite thoroughly belie the Court's gratuitous conclusion.[61]

---

[61] Moreover, to state, as did the lower Court, that petitioner "rather promptly confessed" to the federal charges, looking only at the two and one-half hours of federal interrogation, is to ignore the very real practicalities of the petitioner's predicament. His secret detention, be it federal or state, had already been in progress for

Predominantly, however, the Ninth Circuit erred in its interpretation of the law. The exclusionary rule is no longer dependent upon a showing of "long questioning in the hostile atmosphere of a small company-dominated mining town", [T.R. 101, 342 F.2d at 687], as the Court felt. Rather, as successive judicial interpretations of the *McNabb* doctrine (ironically, including a large number of decisions by the same Ninth Circuit) make abundantly clear, it is the *excessive period of secret detention* which is *itself* the "abuse to be prevented."[62]

*United States* v. *Coppola*, 281 F.2d 340 (2nd Cir. 1960), *aff'd*, 365 U.S. 762 (1961), is not authority for a contrary result. Indeed, the reasoning of the decision (although not, of course, the holding), affirmatively supports the position urged here, in derogation of the Ninth Circuit's result. The majority of the Second Circuit in that case, in reversing the original three-judge panel, distinguished *Anderson* repeatedly throughout the opinion on the specific ground that, *"the F.B.I. in no way caused or contributed to Coppola's detention* by the Buffalo police." 281 F.2d at 341 (Emphasis supplied; see also 343, 344). The *Coppola* court also found that the F.B.I. interrogation *"did not contribute*

---

over fifteen hours, when the federal officers commenced their interrogation; from all that appears he had no reason to believe that, short of "cooperation," the end was anywhere in sight. In such a case, from the detained prisoner's point of view it is splitting hairs over-fine to start the clock at the fifteenth-plus hour.

[62] Compare *Ginoza* v. *United States*, 279 F.2d 616 (9th Cir. 1960); *Muldrow* v. *United States*, 281 F.2d 903 (9th Cir. 1960). And see particularly *Morales* v. *United States*, 344 F.2d 846 (9th Cir. 1965), virtually identical to this case on the period and circumstances of the arrest, detention and interrogation, and differing only in the happenstance of a more timely release of official custody from state to federal authorities.

*to any delay in arraignment,*" since the federal interrogation in that case had not commenced until early evening, when a committing magistrate was no longer available. 281 F.2d at 343. It must be assumed that it was on the basis of these findings that this Court affirmed the decision in a brief, per curiam opinion, stating that "the particular facts of the case are not ruled by Anderson." 365 U.S. 762. In the instant case, however, neither of the Second Circuit's findings can be sustained: The F.B.I. most certainly both caused and contributed to petitioner's detention; and the federal officers' interrogation, begun at high noon of a Thursday, most certainly contributed to the delay in arraignment.

What the Ninth Circuit in this case has done, in ignoring the history and purpose of the prophylactic exclusionary rule, is to turn the clock back at least a full five years, and more likely a whole half century! In the closely analogous area of illegally seized evidence (which also began simply as an exclusionary rule of federal criminal procedure), the inadmissibility of such evidence in a federal court, when the result of a joint federal-state operation—such as here—was declared as early as *1914,* in *Weeks* v. *United States,* 232 U.S. 383 (1914). Forty-six years later, still treating the exclusionary doctrine as a matter of federal evidentiary law, this court rejected the "silver platter" doctrine—relying significantly in part on *McNabb. Elkins* v. *United States,* 364 U.S. 206, see 223 (1960). The same philosophy in that parallel line of cases—*at least* through the stage of *Weeks!*—should apply with equal force where the "unlawful fruits" are confessions, rather than inanimate, tangible pieces of evidence. Thus, where the federal participation has *actively contributed* to a state's *incommunicado* deten-

tion, beyond the brief period allowed under *federal* law, as a matter of federal criminal procedure, at least, confessions elicited thereby should be held inadmissible in a federal court. Compare *Mapp* v. *Ohio, supra,* 367 U.S. at 656; *Elkins* v. *United States, supra,* at 217. Not so to hold is to open up precisely the easy avenue of "*evading the letter and spirit of Rule 5(a),*" against which the *Coppola* Second Circuit cautioned (281 F.2d at 344). In this light, the existence of a state law, such as Missouri's, permitting to *state* officials the liberality of a drawn-out, safeguardless detention, should have absolutely no bearing.

As a matter of federal law, prompt arraignment is not only a means of removing the blanket of secrecy around a prisoner. It is also the point at which, as a matter of federal law (and the implications of *Escobedo* aside) the *exercisable* right to counsel, as well as a panoply of other vital rights, attach. See Rule 5(b), Federal Rules of Criminal Procedure:

> "*Statement by the Commissioner.* The commissioner shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules." See also Rule 44.

As noted under the last argument heading, it is believed that this right to a prompt and *open* advisement of constitutional rights is a prerequisite to a fair criminal procedure

thereafter. At the very least, however, it is certainly so as a matter of the more carefully safeguarded federal criminal law.

There is another compelling reason why Missouri's twenty-hour rule should have no effect in the instant case. As already observed, and as the separate opinion of Mr. Justice Frankfurter in *Culombe* v. *Connecticut*, 367 U.S. 568 (1961), carefully delineates, the several states have adopted—albeit frequently ignore—a wide variety of "prompt-arraignment" statutes, ranging from a few as (theoretically) stringent as the federal rule, all the way up to and past the twenty-hour liberality of the Missouri rule. It would, in view of this wide diversity, be an anomaly to let the rights of a federal prisoner be so pivotally controlled by the state in which he happened to be arrested. It is after all, a *unitary* federal criminal law system, which by rights should have a *uniform* interpretation and application. *Erie* v. *Tompkins*[63] has no application here.

This is not, of course, to say that in a case such as this the federal authorities must necessarily "demand" or "become responsible for [the] custody" [64] of a federally-suspect prisoner being detained by the state authorities. What it does mean, however, is that federal authorities should at least afford the prisoner an open, public hearing on the federal charges—thus, *inter alia*, bringing the right to counsel into a tangible, meaningful perspective—prior to their interrogation of the prisoner, looking toward a confession

---

[63] *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938).

[64] [T.R. 101, 342 F.2d at 687.] Of course, on the facts of the case, there can be little question but that the Kansas City office of the F.B.I. was indeed, in large part, "responsible" for petitioner's custody.

relating to those charges. In *Mallory* v. *United States*, 354 U.S. 449, 454-455 (1957), this Court expressed the philosophy of the federal exclusionary rule thus:

> "The arrested person may, of course, be 'booked' by the police. But he is not to be taken to police headquarters in order to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately his guilt.
>
> • • •
>
> "[T]he delay [between arrest and arraignment] must not be of a nature to give opportunity for the extraction of a confession."

As a matter of federal justice, this philosophy should not be permitted to be so effortlessly defeated, by the easy expedient condoned by the lower Court here.

## III.

**Petitioner Did Not Waive the Right to Object to a Constitutionally-Inadmissible Piece of Evidence, in View of the Controlling Law of the Circuit at the Time; Nor Can the Admission of the Evidence Be Considered "Harmless Error."**

As noted in the statement of facts, the court below rather summarily (and certainly angrily) brushed aside the question of the unconstitutionally-seized topcoat with the epithet of "sabotage," stating:

> "We think the appellant is not, in the circumstances, entitled to raise the question for the first time in this appeal. When inadmissible evidence is offered by the

prosecution in a criminal trial, we think the defendant may not sit silent and allow the trial to be sabotaged when the inadmissibility of the evidence is obvious or could be made so by a simple inquiry." [T.R. 105, 342 F.2d at 689].

The principal difficulty with this pronouncement is the existence of the then-controlling decision of the same Ninth Circuit in *Fraker* v. *United States*, 294 F.2d 859 (9th Cir. 1961). In that case, just as in petitioner's, the defendant was arrested, by city police, in or about his automobile; there as here, the automobile (as well as the prisoner's person) was preliminarily searched at the time of the arrest. Again as here, Fraker was taken to the city jail and his car towed to "a nearby garage." Fourthly, as also true here, it was the arrival on the scene of the F.B.I. agents which activated a further search of the car, in the storage lot, where, as here, the incriminating evidence was discovered. The timing, to be sure, was different; in *Fraker*, the search was made approximately one hour and a half after the prisoner's arrest, whereas, here, although the time factor is uncertain, it was a matter of some several hours at best. Nevertheless, it is apparent that the pivotal issue, for the Court, was not the *time* of the search, but the *location*.[65] And in *Fraker*, just as in the instant case, prisoner and vehicle had long since parted company, both temporarily and spatially. What must, at the very least, be said of the *Fraker* precedent is that it made the exclusion of the topcoat, in petitioner's case, a highly dubious possibility.

---

[65] The Court cited to its holding the case of *Bartlett* v. *United States*, 232 F.2d 135, 139 (5th Cir. 1956), which held a similar search "substantially contemporaneous with the arrest[s]" without even referring to the time factor.

And, at any rate, petitioner himself was unaware of the right to object, and had no intention of waiving or relinquishing any rights.[66]

It was not until the decision in *Preston* v. *United States*, 376 U.S. 364 (1964), that this Court clearly and squarely pinpointed the fact that the mere physical separation of prisoner and automobile, each into its own place of safekeeping, was sufficient to raise a constitutional bar to any search without a warrant; in such circumstances, the Court observed, such a search "is simply not incident to the arrest." *Preston* v. *United States*, 376 U.S. at 367.

In view of the lower court's intemperate language, even its subsequent discussion of "harmless error" rings rather hollowly. In the first instance, it is highly questionable whether the admission of any evidence seized in violation of the Fourth Amendment can ever be "harmless error." *Fahy* v. *Connecticut*, 375 U.S. 85, 86 (1963); *James* v. *Louisiana*, —— U.S. ——, 15 L.Ed.2d 30 (1965). That issue aside, as a factual matter the identification of the topcoat, carefully shown to and identified by each of the eyewitnesses to the second robbery, undoubtedly helped strengthen an identification which was, in other respects, at best uncertain and rather unreliably obtained. At any rate, petitioner was entitled to have the appellate court pass dispassionate judgment on the topcoat issue; in its biting rebuke, however, it seems highly unlikely that it did so.

---

[66] See the Affidavit attached to the Motion to Supplement Petition, dated April 29, 1965. Cf., *Henry* v. *Mississippi*, 379 U.S. 443 (1965).

## IV.

**The Speculation and Comment of the Prosecuting Attorney, During Closing Argument, Calling Attention to Petitioner's Failure to Testify, Constituted Reversible Error.**[67]

It has long been recognized that comment by a prosecuting attorney upon a defendant's failure to take the witness stand is highly prejudicial and alone may be grounds for reversal. *Wilson* v. *United States,* 149 U.S. 60, 67 (1893); *cf., Berger* v. *United States,* 295 U.S. 78 (1935). This past Term, in *Griffin* v. *California,* 380 U.S. 609 (1965), this Court firmly established that the error of prejudicial comment is not merely of statutory proportions, but finds its basis in the constitutional guarantee of the privilege against self-incrimination.

It is submitted that such prejudicial comment and consequent reversible error was committed by the prosecutor here, during the course of his closing argument, in his lengthy speculation to the jury on "what was in the defendant's mind" in coming to trial, and in suggesting to the jury that "you as reasonable people can infer that if evidence can be contradicted then it should be . . . ."

While comment on the fact that the prosecution's evidence remains uncontradicted—in which the prosecutor here also liberally indulged [see T. R. 85-86, 86, 88]—has been held within the bounds of legitimate argument, it is submitted that the prosecutor here, in his almost outlandish

---

[67] As noted in the "Questions Presented", this matter, although fully raised and briefed in the court below, was not presented to this Court in the petition for certiorari; it is here now on a supplemental motion to amend the petition, on which the Court has not yet acted.

speculation ("maybe the plane will crash and maybe the witnesses won't get here," "maybe the prosecutor will drop dead in the middle of the trial"), went too far. Compare *United States* v. *Tomaiolo*, 249 F.2d 683, 694-695 (2nd Cir. 1957).

The speculative words of the prosecutor to which this argument is directed occurred during the course of his opening argument to the jury, and read, in full, as follows:

> "I think that this has been a case where you might at times [have] asked yourselves, 'Well, with this evidence why are we here at trial?'
>
> "Well, this isn't really a proper question for you to ask. Under our judicial system any person charged with a crime can require the prosecution to prove its case against him beyond a reasonable doubt and to a moral certainty.
>
> "I don't know what was in the defendant's mind. He may have felt, 'Well, maybe the plan [sic] will crash and maybe the witnesses won't get here.' Or, 'Maybe the prosecutor will drop dead in the middle of the trial.' Something like that.
>
> "In his position I suppose any hope would be something to grasp onto; but the fact is that the evidence has been presented, the fact is that the defendant has had his day in court, he has been afforded every right that he is entitled to. He has been accorded everything that the Constitution of the United States and the laws of the United States say he should have. He has had his attorney, he has had a right to examine witnesses, he has had a right to offer evidence in his own behalf, and this has been done and the evidence still remains un-

controverted and more than sufficient to establish his guilt.

"I don't think then that you should allow the question of 'Well, why did he come in? Maybe he wants us to feel sorry for him' or something of that nature to enter your minds." [T.R. 86-87].

This language, coupled with the prosecutor's frequent references to the "uncontradicted" nature of the government's case, impelled petitioner's defense attorney to remind the jury of a defendant's constitutional right not to testify—as well, of course, as his right "to insist on his day in court." [T.R. 88-89]. Thus chided, the prosecuting attorney sought, in summation, to undo the damage of his opening statements; it is submitted, however, that in fact he simply compounded the injury. In language strikingly similar to that struck down by this Court nearly seventy-five years ago, in *Wilson* v. *United States*, 149 U.S. 60 (1893), the prosecutor returned to the subject with the following:

"Counsel said or tried to say that I inferred that because the defendant didn't testify you should draw some inference. That isn't true. No defendant can be compelled to testify against himself, and I do not ask you to draw any inference from that, and you shouldn't.

"I do say that the evidence is uncontradicted, and I think you as reasonable people can infer that if evidence can be contradicted then it should be; but I urge you, and you should not draw any conclusion from the failure of any defendant in this case or any other not to testify." [T.R. 89].

Compare this with the following quotation from *Wilson*:

> "[T]he reply of the district attorney to the mild observation of the court only intensified the fact to which he had already called the attention of the jury: 'I did not mean to refer in a single word to the fact that he did not testify in his own behalf,' which was equivalent to saying, 'You gentlemen of the jury know full well that an innocent man would have gone on the stand and have testified to his innocence, but I do not mean to refer to the fact that he did not, for it is a circumstance which you will take into consideration without it.'" 149 U.S. at 67.

Certainly there can be little question that petitioner's failure to take the witness stand was, by the end of the closing argument, pinpointedly and indelibly imprinted upon the jurors' minds.

## V.

**The Indictment's Multiplicitous Counts, of Which One Offense Was Entirely Devoid of Proof, May Have Served as an Unwarranted, Inflammatory Element in the Jury's Deliberations, to Petitioner's Unfair Prejudice.**

The question raised under this heading, certainly not rising to the dignity of constitutional proportions, is one which nevertheless it is felt this court should consider in its supervisory authority over the federal judicial system. That question is what effect, if any, should be given to a situation where a multiplicitous count in an indictment includes more than one separate offense, where the proof on one such offense is entirely lacking, and where, nevertheless, the jury returns a general verdict of guilty on the count?

Insofar as petitioner has discovered, the question has received virtually no attention in federal courts; indeed, the only decision which has been found which even obliquely raised it is one federal district court which did so only obliquely. Pointing out the logical inconsistency which occurs in a situation such as this, that court stated:

> "A jury cannot find a verdict of guilty as to one part of a count in an indictment and not guilty as to another part of the same count. Nor can a judge." *United States* v. *Martinez-Gonzales*, 89 F.Supp. 62, 64 (S.D.Cal. 1950).[68]

The multiplicity of the counts in this case consisted of the indictment's rolling into one (as to each of the robberies) the lesser offense of bank robbery described in 18 U.S.C. §2113, subsection (a), with the greater offense of actual endangering of life in the commission of such a robbery, covered in subsection (d).[69] The Ninth Circuit itself has recognized that the latter offense requires an *objective* knowing that life was *actually* endangered by the use of "a dangerous weapon or device," and that, as a consequence, the use of an *unloaded* gun is insufficient to constitute the offense.[70] So holding, that court recently stated the law (at least, the law of the Ninth Circuit) thus:

---

[68] See also the state-court decisions cited in 23A C.J.S. Criminal Law, §1406, page 1098.

[69] See Appendix A, for the two Code provisions, see T.R. 1-2, for the counts of the indictment.

[70] At least, in the absence of the use of such a gun as a deadly-weapon club—certainly not the case here.

"We agree that the aggravated form of robbery described in the latter part of section 2114[71] as putting 'life in jeopardy by the use of a dangerous weapon' means more than a 'mere holdup by force or fear.' It must be a holdup involving the use of a *dangerous weapon actually so used* during the robbery that the person being robbed is placed in an *objective* state of danger." *Smith* v. *United States*, 309 F.2d 165 (9th Cir. 1962) (Emphasis and footnote supplied).

In the instant case, there is absolutely no evidence of such an "objective state of danger," as to either of the two robberies. Both witnesses named in the indictment testified that the felon had in fact never even fully (or at all) drawn the gun [T.R. 16; 15, 17].

All that the record showed, as to either count of the indictment, was, at best, the "force and violence, or . . . . intimidation" which is an elemental part of the simple crime described in subsection (a). The record evidence failed entirely to support a finding of the aggravated offense of subsection (d).

Defense counsel adverted to the prosecution's failure to prove this additional element in the course of his closing argument.[72] The judge's instructions on the point were, if not as unmistakably clear as they might have been, at least essentially proper, in pointing up the disjunctive nature of the two offenses, and in charging that "each and all of the elements" of each count had to be established [see T.R. 91-

---

[71] This section, also from Title 18, contains the same lesser- and greater-offense subdivisions as does §2113.

[72] He stated, "[T]here is no evidence in this record that it was capable of being used as a gun. There is certainly no evidence in this record that it was loaded." [III R. 66].

92]. Yet, notwithstanding the charge and in the fact of the failure of proof, the jury returned a general verdict of guilty to each count, necessarily therefore including the greater as well as the lesser offense.

This is not, then, a case of indulging in "unfounded speculation," *Opper* v. *United States,* 348 U.S. 84, 95 (1954), as to whether the jury was "confused" and therefore disregarded the trial court's instructions—for as a matter of controlling Ninth Circuit law they necessarily and axiomatically had to have disregarded the instructions. "Each and all the elements" simply were not proved. It is not a case of conflicting evidence or of scanty evidence, but of no evidence at all, as to the second offense.

The question, then, is whether this failure of proof makes any difference, in light of the fact that the Judge's fifteen-year sentence imposed on each count was within the permissible limits of §2113(a) alone. The initial difficulty is of course that, at least as a technical matter, the validity of the *sentence* is not even reached; the focus is, rather, one step prior in time to this sentence, on the conviction itself, for without a valid conviction there is nothing on which any sentence at all can lawfully be predicated.

As a practical matter, however, what difference does it make? In petitioner's case, it may have made some significant difference, for the following reason: Had the two offenses, greater and lesser, been (as they should have been), separately stated, the defense would have had the opportunity to move for—and, it would seem, to have obtained—a directed verdict of not guilty on the aggravated offense, prior to any submission to the jury. With but a single count, of course, that was impossible, and the jury was permitted to consider the more inflammatory but unproven element along with the remainder. In such an in-

stance, who can say how much of a part the unproven, more emotionally charged element played in the give and take of the jury's deliberations?

Certainly the practice of loosely-drawn indictments is one which ought to be discouraged. Whether, or to what degree, the looseness in this case marred the integrity of petitioner's trial may be open to question. Yet at some point, it would seem, fairness to the accused would demand that the practice be rebuked.

The point will not stand belaboring; on the other hand, it does deserve consideration.

## Conclusion

The circumstances under which petitioner's two confessions were obtained are irredeemably infected with one-sided unfairness and misuse of authority. For reasons of both federal-law and constitutional dimensions, those confessions should have been excluded from evidence at petitioner's trial. Additionally, certain other procedural variances, individually of lesser significance, in combination undoubtedly worked to prejudice petitioner unjustly and beyond legal limitations of due process.

For the reasons stated herein, it is respectfully submitted that the judgment of the Court below should be reversed.

Respectfully submitted,

F. Conger Fawcett
Graham James & Rolph
310 Sansome Street
San Francisco, California

*Counsel for Petitioner*

January, 1966.

# APPENDIX

## APPENDIX "A"

### Constitutional Provisions, Statutes and Regulations Involved

*The Constitution of the United States*

*Amendment IV*:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

*Amendment V*:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

*Amendment VI*:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses

against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

*Statutes*

*18 U.S.C. §2113(a)*:

Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, or any savings and loan association; or

Whoever enters or attempts to enter any bank, or any savings and loan association, or any building used in whole or in part as a bank, or as a savings and loan association, with intent to commit in such bank, or in such savings and loan association, or building, or part thereof, so used. any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny—

Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

*18 U.S.C. §2113(d)*:

Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

*Regulations*

*Rule 5(a), Federal Rules of Criminal Procedure*:

*Appearance before the Commissioner.* An officer making an arrest under a warrant issued upon a complaint or any

person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

# INDEX





208-145—66——1

## CITATIONS

Cases—Continued

# In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 761

CARL CALVIN WESTOVER, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES

### OPINION BELOW

The opinion of the court of appeals (R. 98–106) [1] is reported at 342 F. 2d 684.

### JURISDICTION

The judgment of the court of appeals was entered on March 11, 1965 (R. 106). The petition for a writ of certiorari was filed on April 10, 1965, and was granted on November 22, 1965 (R. 106–107). 382

[1] "R." refers to the printed record. "Tr." refers to the three-volume typewritten transcript of record transmitted from the court of appeals. "Supp. Tr." refers to the supplementary papers transmitted from the district court.

U.S. 924. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether confessions made by petitioner, while in State custody, to F.B.I. agents who had warned him of his right not to make a statement and to consult an attorney were inadmissible in evidence as having been obtained in violation of his Fifth and Sixth Amendment rights.

2. Whether petitioner's confessions were the inadmissible product of an improper "working arrangement" between State and federal authorities.

3. Whether the admission in evidence, without defense objection, of a topcoat seized from petitioner's car constituted reversible error.

4. Whether the evidence was sufficient to support the charge that petitioner endangered lives during his commission of bank robberies.

## STATUTE INVOLVED

18 U.S.C. 2113 provides in pertinent part:

> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, manage-

ment, or possession of, any bank, or any savings and loan association * * *

* * * * *

Shall be fined not more than $5000 or imprisoned not more than twenty years, or both.

* * * * *

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

STATEMENT

Petitioner was tried by a jury, in the United States District Court for the Northern District of California, on a two-count indictment charging that he robbed two federally insured financial institutions located in Sacramento, California, and that, in the course of each robbery, he jeopardized the life of a named person "by the use of a dangerous weapon, to wit: a gun," in violation of 18 U.S.C. 2113 (a) and (d) (R. 1–2). Petitioner was convicted (R. 94) and was sentenced to imprisonment for fifteen years on each count, the sentences to run consecutively (R. 97). The court of appeals unanimously affirmed the conviction (R. 98–106).

### 1. THE CRIMES

On February 4, 1963, at about 12:30 p.m., a man entered the Fort Sutter Savings and Loan Association in Sacramento, California (a federally insured institution), and asked to see the manager about a loan (R. 4–5, 9). The assistant controller, Mr. Roth, directed him to take a seat by his desk (R. 5). At that point the man "display[ed] a Luger type weapon" and informed Roth that "it was a hold-up" (*ibid.*). He handed Roth a paper sack and said, "Don't give me any trouble or I will blow the place apart" (R. 5, 9). Under the robber's direction, Roth proceeded to fill the sack with the contents of two tills and some additional cash from the vault (R. 5, 8–9, 11–13). He returned the sack to the robber, who promptly fled through the front door (R. 5, 11–12). An audit showed that $1,546.50 was taken in the robbery (R. 6, 9–10). F.B.I. agents subsequently twice showed employees of the savings and loan association a series of photographs on the chance that they might be able to identify the robber, but they were unable to do so (II Tr. 24–25).[2]

On March 14, 1963, between 12:30 and 1:00 p.m. a man entered a branch office of the Bank of America

[2] On a third occasion, apparently in early April, photographs of petitioner were identified as those of the robber (R. 6–8; Tr. 24–26).

(a federally insured institution) in Sacramento, California (R. 14–15, 18–19, 21, 23, 25). He approached the assistant cashier, Mr. Patella, and showed him a note which read "This is a hold-up. Give me all your money, don't make any noise and nobody will get hurt" (R. 15). The man then took back the note, stated "This is a hold-up," pulled back his coat and "started drawing out a gun" (R. 15). Patella asked, "How much do you want?" The man replied "[a]ll of it" and gave Patella a paper sack (R. 16, 26). Under the man's orders, Patella walked through three tellers' cages and deposited currency from each into the sack (R. 16, 19, 21–22, 24, 27–28). The robber followed Patella on the other side of the counter, keeping his hand under his coat (*ibid.*). He then took the filled sack and backed out of the front door, with his hand still under his coat (R. 16, 28). He escaped with $4,254 (II Tr. 99–100). Part of this was "bait money"—separately packaged bills which had been previously recorded by denomination and serial number and which were kept in each teller's cage in the event of a robbery (R. 19–20, 22–25, 29–30). Shortly after the robber had fled, local police and an F.B.I. agent arrived at the bank, conducted an investigation and secured a physical description of the robber from several witnesses to the offense (II Tr. 74–78, 106, 110–111, 116–118; Def. Ex. A).

### 2. PETITIONER'S ARREST AND CONFESSIONS

On March 20, 1963, at approximately 9:45 p.m., two local police officers arrested petitioner in Kansas City, Missouri,[3] just after he had entered his parked automobile (R. 35, 37). The arrest was based upon petitioner's suspected involvement in two Kansas City robberies which had occurred earlier that month (R. 35).[4] Petitioner initially identified himself to the officers as "George E. Yanes", but later acknowledged his actual identity (R. 35, 37). Upon searching petitioner at the scene of the arrest, the officers found $619 in currency (R. 36–38). They also searched petitioner's automobile, discovering $2 be-

---

[3] In one of his written confessions, petitioner stated that shortly after the Bank of America robbery he had gone to San Francisco, and, from there, had driven to Kansas City, Missouri, arriving on March 18, 1963 (R. 67).

[4] One of the arresting officers initially stated at trial that "[t]he arrest was effected in connection with local matters, also reports from the local F.B.I. office in Kansas City, Missouri that the man was wanted on a felony warrant from the State of California" (R. 35). The arrest report of the same officer, to which he later asked to refer to refresh his memory (R. 44, see R. 47–48), indicated that the arrest was based on the two local robberies, and that between the time of the arrest and the time of petitioner's booking the local F.B.I. office called to report that a California warrant for petitioner's arrest was outstanding (Ex. 12, for identification). This referred to a *State* warrant. The federal warrant involved in this case was issued in the Northern District of California two days later (Supp. Tr. 12).

tween the floor board and the rear seat (R. 36–37) and observing a houndstooth-pattern gray topcoat (R. 37). The officers gave the $621 back to petitioner, and one then drove him in a police car to the Kansas City Police Department while the other officer followed in petitioner's automobile (R. 38–40, 46). When they arrived at the basement garage in the headquarters bulding, five to ten minutes after leaving the scene of the arrest, the automobile was searched a second time, after which it was towed away to the police storage lot (R. 39–42, 45–46). The officers then took petitioner upstairs and notified "other units of the Department who had reports implicating him in recent hold-ups in their Districts" (R. 40). Petitioner was placed in a "line-up" where he was identified by an observer in connection with one of the local robberies (R. 40, 43, 46). Thereafter, two officers, with the written consent of petitioner (Gov. Ex. 15), searched his hotel room and found a pistol (R. 60–61).

Sometime before petitioner was "booked", one of the arresting officers received a telephone call from the local F.B.I. office requesting that petitioner "be held for them also" because they wanted to talk to him (R. 44). The telephoning agent did not state whether the request was made in relation to any particular offense (R. 44), but did state that "Sacramento, California, holds a Felony Warrant on the sub-

ject" which would be forwarded to the department (Ex. 12, for identification).[4] Petitioner was booked at approximately 11:45 p.m. (R. 40–41, 70; see R. 83). The "booking sheet" read, in pertinent part (R. 43):

> Booked for investigation check in connection with the holdups of the Murphy Finance Company, 6226A Troost, which occurred on 3–4–63,[5] Complaint No. 395206, and robbery of the New York Bakery, 7016 Troost, which occurred on 3–5–63, Complaint No. 395531. Also possible outside warrants, California. * * *

The next morning, on March 21, at the Police Department Building, the Kansas City police questioned petitioner concerning the local robberies (R. 73; see

---

[4] The officer first testified that the booking was based on the two local robberies and the "outside warrant from California" (R. 44), indicating that the telephone call preceded the booking. When directly asked whether the call came before or after the booking, the officer stated it "is on my original report here" and asked if he might read it (*ibid.*). He was told that he might refresh his recollection, but that he could not read from the report. He then replied: "Following the man's booking I received a call from Agent Dobbs of the F.B.I. office * * *" (*ibid.*). It does not appear from the record whether he had looked at the report before making the reply, or whether he had decided it was unnecessary to refresh his memory, but in any event this reply was inaccurate. The written report confirms his first testimony, and shows that the telephone call preceded the booking (Ex. 12, for identification).

[5] The printed record incorrectly reads "2–4–63" (R. 43). The typewritten transcript correctly states the date as "3–4–63" (II Tr. 143; see Def. Ex. B).

R. 80). Petitioner gave them a statement concerning these offenses, although prior to the line-up the previous evening he had denied complicity (II Tr. 208). That same morning, three F.B.I. agents arrived at the police headquarters to interview petitioner regarding the Sacramento robberies (R. 73, 81). "Shortly before noon" (R. 71, 80, 84; see R. 62), a Kansas City police detective introduced the agent to petitioner, and stated that "they were through talking to Mr. Westover at that time and the F.B.I. could talk to him" (R. 80–84). The detective left with the agents the pistol which had been found in petitioner's hotel room (R. 68).

The F.B.I. agent in charge thereupon advised petitioner "that he didn't have to make a statement, that any statement he made could be used against him in a court of law and that he had a right to see an attorney before he made the statements" (R. 82; see R. 63, 73). No threats, promises, or inducements of any kind were expressed or implied (R. 50, 63, 73, 81–82), nor, to the agents' knowledge, had any been made earlier by the local police (R. 73, 81–82).[1] Petitioner

[1] A Kansas City police officer, who had been present during part of the police questioning on the local robberies, testified at trial that no inducements were offered to petitioner, that "there was no deal or anything of that nature negotiated between [the Police] Department and the Federal Bureau of Investigation," and that there was no suggestion that the State charges would be dropped in return for petitioner's cooperation with the F.B.I. (R. 50, 76–77; see R. 78).

freely and voluntarily admitted the two Sacramento robberies (R. 62–63, 82), identified the pistol as the one he had used (R. 68), and began to give the details. One of the agents started transcribing the facts in longhand shortly after noon, setting them forth as two separate statements for administrative and filing purposes (R. 71, 83–84). As the statements were being written down, the transcribing agent stated aloud his summary of the facts in order that petitioner would be aware of the exact phrasing being employed (R. 71). When the statements were completed, they were given to petitioner for his examination. Each statement acknowledged the agents' preliminary warning (R. 73, 82) by reciting in the opening paragraph (R. 64–65, see R. 66):

> I have been advised that I do not have to make a statement and that any statement I do make can be used against me in a court of law. I have also been advised that I have a right to consult an attorney. * * *

Petitioner wrote at the conclusion of each, "I have read this * * * statement, and it is true to the best of my memory", and thereafter affixed his signature (R. 65–67). The interview ended at about 2 or 2:30 p.m., approximately two hours having transpired in developing and transcribing the seven pages of facts (R. 71, 83).

About the same time that the three agents began the interview with petitioner (R. 58), a fourth agent was

taken by a local police officer to the police property room where a list was made of the serial numbers (R. 50–52, 57; II Tr. 175) of the $621 in currency which had been taken from petitioner and placed in the property room just prior to the booking procedure (R. 41). The same police officer also took the F.B.I. agent to petitioner's impounded automobile. They searched the vehicle and removed the overcoat (R. 56) which had been observed by the arresting officer at the time of petitioner's apprehension (R. 37).

On the morning of the following day, March 22, petitioner advised the F.B.I. agents that he wished to make some changes in his transcribed statements (R. 74). He then corrected some inaccuracies relating to the automobiles used in the two robberies (R. 74–75). He asserted that the remainder of the written statements was true (R. 75).

### 3. SUBSEQUENT PROCEDURES

On March 22, in Sacramento, as a result of the information supplied by the F.B.I. office in Kansas City, a federal complaint was filed charging petitioner with the commission of the two robberies. The complaint recited that it was based "on admissions of the defendant" (Supp. Tr. 5). A federal warrant was issued for petitioner's arrest (Supp. Tr. 12; R. 72–73; see R. 84). Seven days later, on March 29 (Supp. Tr. 3), the present indictment was returned in Sacramento (R. 1–2).

The warrant issued in Sacramento was received by the United States Marshal in Kansas City on April 1 (Supp. Tr. 12). On that same day, the State authorities released petitioner to federal custody and he was placed under federal arrest (Supp. Tr. 7, 12). Petitioner was promptly taken before a United States Commissioner. At his appearance before the commissioner, petitioner was represented by Larry Schrader, Esq., a Kansas City attorney (Supp. Tr. 7). After being advised of all his rights, petitioner signed a waiver of a removal hearing, and was subsequently transported to Sacramento (Supp. Tr. 7, 11).

Sometime during the first part of April (R. 33; II Tr. 101), photographs of petitioner (Exs. 9 and 10), which had been taken by Kansas City police on March 21 (R. 32–33), were shown by F.B.I. agents to the witnesses of the Sacramento bank robbery. The witnesses identified the subject of the photographs as the man who had committed the offenses (R. 32–33; II Tr. 47–49, 51, 58–59, 65, 73). Photographs of petitioner were also shown to the witnesses of the savings and loan robbery, who identified the pictures as those of the robber (R. 7–8; II Tr. 24–26).

On April 23, petitioner appeared for arraignment in Sacramento, and was informed of the right of an indigent to an appointed attorney (II Tr. 2–3). Petitioner requested the appointment of counsel on the ground that his assets had been confiscated in Kansas City. After inquiry, the court appointed Richard A.

Case, Esq., to represent petitioner, with the express proviso that Mr. Case could negotiate with petitioner for a fee.[8]

Petitioner pleaded not guilty at his arraignment on April 25 (II Tr. 5–6). Mr. Case thereafter appeared in the district court on May 15 and asked to be relieved of the appointment.[9] The court, after ascer-

---

[8] Petitioner stated that he owned an automobile and had over $600 in funds, but, since it had all been confiscated by the Kansas City Police, he requested that counsel be assigned to represent him (II Tr. 3). The court asked him what kind of automobile it was. Petitioner replied (II Tr. 3–4):

> '57 Ford. * * * I was arrested in Kansas City, Missouri. I turned—I got a lawyer back there. I got the car released to me but they're still holding my money and clothes, everything.
>
> * * * * *
>
> The COURT. Well, I am going to accede to your request and appoint an attorney for you, but I am going to give that attorney the right to negotiate with you for the payment of a fee. In other words, if you got $600 and also an automobile, there's no reason why we should impose upon the Bar Associaton of this community the obligation to defend you when you could pay them, provided you get this money released.
>
> Now, that is up to the Attorney to work out——
>
> The DEFENDANT. I understand that.
>
> * * * * *
>
> The COURT. All right. The Court will appoint Richard A. Case to represent this defendant with the understanding that Mr. Case can negotiate with Mr. Westover for a fee.

[9] Case said he had advised petitioner to change his plea, which petitioner decided not to do, and he stated that "I could not in good conscience carry on if [petitioner] is not going to accept my best advice in connection with this case" (II Tr. 7–A).

taining that petitioner had no objection to a substitution of attorneys (II Tr. 7–B), appointed James S. Eddy, Esq., (II Tr. 7–C) a former Assistant United States Attorney who had had considerable experience in the trial of criminal cases (see II Tr. 31, 205; Memorandum and Statement of Grounds of Appeal, p. 3, n. 4).

Petitioner's trial was conducted on June 10, 11 and 12, 1963. The witnesses to the savings and loan robbery testified concerning the offense (R. 3–13), identified petitioner's pistol as resembling the one which had been used (R. 7), and unequivocally identified petitioner as the robber (R. 5, 7, 9–10, 12; Tr. 26–27). Witnesses to the bank robbery described the commission of the crime (R. 14–28), identified petitioner's pistol as resembling the weapon employed (R. 17), and positively identified petitioner as the man who had committed the offense (R. 15, 17–21, 23–28).[10] Some of the currency found in petitioner's possession in Kansas City was identified by serial number as part of the bank's missing "bait money" (R. 19–21, 52–55, 57; II Tr. 175). After presentation of the above evidence, the government introduced petitioner's two statements to the F.B.I. agents (R. 64–67). Although he extensively cross-examined the agents and three Kansas City policemen, petitioner's counsel

[10] One witness testified that the robber had a blue tattoo between the thumb and fingers on his left hand (R. 17–18). Petitioner had such a tattoo (R. 68; see Ex. 10).

asserted no objection of any kind to the admission of the statements. Similarly, he made no pre-trial motion to suppress the topcoat nor did he object to its admission in evidence at the trial.

INTRODUCTION

This case and the four others with which it is being heard [11] involve use at a criminal defendant's trial of incriminatory statements made by him in response to official questioning after his arrest and prior to his appearance before a judicial officer. The facts merely illustrate hundreds of other cases and thousands of situations which arise regularly in the administration of the criminal law throughout the country. They reflect a problem which confronts law-enforcement officials on a daily basis and which is characteristically resolved, as it must be, on a hurried practical evaluation of particular factual circumstances.

To the extent that the five cases present a common issue and suggest the possibility of a particularized constitutional rule governing interrogation by law-enforcement officers of a suspect who has been taken into custody, they obviously involve far-reaching considerations for the United States extending beyond its interest as a party to this litigation. Because of the potential significance of the cases to federal and

[11] *California* v. *Stewart*, No. 584; *Miranda* v. *Arizona*, No. 759; *Vignera* v. *New York*, No. 760; *Johnson and Cassidy* v. *New Jersey*, No. 762.

local law enforcement, we will undertake in this brief preliminary to discuss, more broadly than appears to be necessary for a disposition of this case, what we believe to be the appropriate legal principles which govern decisions in cases of this sort. Later, we turn to the specifics of this case in light of those principles.

Our position, briefly stated, is that the principal inquiry with regard to the admissibility of statements obtained from a suspect after his arrest must focus on whether the totality of the circumstances surrounding his interrogation warrants a conclusion that such statements were obtained by coercion, by overreaching or by some other impermissible influence over the exercise of his constitutional privilege not to be compelled to incriminate himself. We believe, in other words, that the critical question in most cases is neither the state of mind of the law-enforcement officials—*i.e.*, whether "accusatory" or "investigatory"—nor any single act done or omitted by them—*i.e.*, whether a "warning" was given, whether an attorney was denied access, or whether counsel was provided. It is rather whether the official conduct, taken as a whole, had the effect on the arrested suspect of overriding his free choice to refuse "to be a witness against himself" within the meaning of the Fifth Amendment. This is, we submit, the teaching of this Court's decisions up to and including *Escobedo* v. *Illinois*, 378 U.S. 478. Although there may be in-

stances, *Escobedo* among them, in which the Sixth Amendment guarantee of the assistance of counsel becomes operative at the stage of criminal law enforcement which precedes the suspect's formal appearance before a judicial officer, they constitute rare exceptions to the general rule. By and large, in our view, the constitutional right which must be safeguarded at this stage is the Fifth Amendment privilege against compulsory self-incrimination.

1. THE NEED TO QUESTION

We start from the premise that it is essential to the protection of society that law-enforcement officials be permitted to interrogate an arrested suspect. Without doubting the need for limitations and safeguards, we firmly believe that some opportunity for questioning is indispensable. Mr. Justice Frankfurter's pragmatic observations in *Culombe* v. *Connecticut,* 367 U.S. 568, 571, emphasized the importance of such interrogation:

> * * * Despite modern advances in the technology of crime detection, offenses frequently occur about which things cannot be made to speak. And where there cannot be found innocent human witnesses to such offenses, nothing remains—if police investigation is not to be balked before it has fairly begun—but to seek out possibly guilty witnesses and ask them questions, witnesses, that is, who are suspected

> of knowing something about the offense precisely because they are suspected of implication in it.
>
> * * * [W]hatever its outcome, such questioning is often indispensable to crime detection. Its compelling necessity has been judicially recognized as its sufficient justification, even in a society which, like ours, stands strongly and constitutionally committed to the principle that persons accused of crime cannot be made to convict themselves out of their own mouths.

And in *Watts* v. *Indiana*, 338 U.S. 49, 58 (concurring opinion), Mr. Justice Jackson described the problem in three cases then before the Court:

> In each case police were confronted with one or more brutal murders which the authorities were under the highest duty to solve. Each of these murders was unwitnessed, and the only positive knowledge on which a solution could be based was possessed by the killer. In each there was reasonable ground to *suspect* an individual but not enough legal evidence to *charge* him with guilt. In each the police attempted to meet the situation by taking the suspect into custody and interrogating him * * *.
>
> * * * [N]o one suggests that any course held promise of solution of these murders other than to take the suspect into custody for questioning. The alternative was to close the books on the crime and forget it, with the suspect at

> large. This is a grave choice for a society in which two-thirds of the murders already are closed out as insoluble.

See also LaFave, *Arrest: The Decision to Take a Suspect into Custody,* 385–386 (1965).

It is not hard to hypothesize factual circumstances in which none would dispute the propriety of police interrogation of an arrested suspect. The most obvious are cases in which the life and safety of a victim may be at stake. If, for example, a kidnapper is found and arrested but his victim is still in the hands of a confederate whose whereabouts are unknown, the police are clearly justified in questioning the arrested suspect to find the victim, even though the suspect's answers are likely to be incriminatory. See *People* v. *Modesto,* 42 Cal. Rptr. 417, 423, 398 P. 2d 753 (1965).

Such cases are not, of course, typical, and they may be thought to present quite different problems than those presently before the Court.[12] But they demonstrate that police questioning after arrest may, in appropriate circumstances, serve an indisputably salutary purpose. Many other situations can be imagined in which the justification may be more debatable but in which there are eminently sound

[12] It might be contended, for example, that police would be warranted in seeking the information from the kidnapper, notwithstanding his Fifth Amendment privilege, but would be prohibited from using the statements to prove his guilt at his trial. Compare *Massiah* v. *United States,* 377 U.S. 201, 206–207.

practical reasons favoring interrogation of an arrested suspect. It is important to note, in this regard, that the subject of post-arrest interrogation deals with decisions which law-enforcement officials must make in the exigencies of the moment and which do not lend themselves to the sort of detached reflection on which most prosecutorial decisions are made. The vast majority of arrests are made without a warrant.[13] The law-enforcement officer is compelled to act on his own evaluation of probable cause. He must "deal with probabilities * * *—the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar* v. *United States*, 338 U.S. 160, 175. In such circumstances, after an objectively valid arrest,[14] prompt questioning by the officer will afford him his best opportunity to secure an indication of the probable guilt or innocence of the suspect.

---

[13] In a study of arrest practices in two California cities, 95.7% of the arrests in one city were found to be without a warrant, and 84.7% in the other. Barrett, *Police Practices and the Law—From Arrest to Release or Charge*, 50 Calif. L. Rev. 11, 37 (1960). Results of a two-month preliminary staff study by the National Crime Commission disclose that 87.6% of the serious felony arrests by the District of Columbia police were made without a warrant.

[14] For present purposes the term "arrest" is very broadly used to denote any situation where law enforcement officers have actually and intentionally restricted a person's liberty, whether by stopping the person on the street, by inviting him to accompany them to another place under circumstances plainly ne-

A law-enforcement officer is not, of course, merely an investigator of crime. He is often charged with the responsibilities of maintaining public order and preventing offenses. In fulfilling these responsibilities, he must frequently act without delay. The picture may be one streaked with confusion and alarm; the need for action may preclude, at that point, a reflective resolution of ambiguities. If a policeman sees two men fighting with knives, his responsibility is to take them into custody, although subsequent investigation may reveal that one was acting purely in self-defense. If he finds two men standing over a dead body, each accusing the other of murder, he may arrest both albeit he later discovers that only one should be charged. Restatement, Torts 2d, § 119, illustration 2. If, in responding to a midnight scream for help, an officer sees a man running from the scene, "minimum prudence" requires that the man be apprehended (*Bell* v. *United States,* 280 F. 2d 717, 718

---

gating the person's freedom of choice, by physically assuming control, or by formally announcing an arrest.

We are not here discussing arrests which are eventually recorded as "on suspicion" or "for investigation", where the officer does not in fact have probable cause to believe the suspect has committed an offense. It should be noted, however, that in practice such terms are often used simply as convenient booking entries and do not indicate that the grounds for the arrest were less than required by law. LaFave, *Detention for Investigation by the Police: An Analysis of Current Practices*, 1962 Wash. U.L.Q. 331, 337.

(C.A.D.C.)), even though it may develop that he is entirely innocent of any offense. In all these instances, as in the countless analogous situations in which a great proportion of arrests without a warrant are made, it is imperative that officers be authorized to make inquiries of arrested suspects. The greatest need is to hear a suspect's first explanation and then to screen his story so as to make a prompt and proper disposition of his case. It matters less what the suspect may say, than that he say something. Irrespective whether his statements acknowledge guilt or profess innocence, they contribute to responsible determinations by the police at this stage in the administration of criminal justice.

Before a decision to institute criminal proceedings against an arrested suspect may be justified in instances such as those we have just discussed, responsible action may require brief interrogation and extrinsic investigation in order to clarify doubts and confirm or refute tentative conclusions. With little delay, identification can be checked, alibis investigated, explanations verified, witnesses' statements compared, and physical evidence analyzed. Evidence which might disappear with even a brief postponement of inquiry may be secured. If the likelihood of guilt on which the arrest was based is reinforced, the police will have disposed of the bulk of their job

quickly and effectively, and the suspect may be charged before a magistrate. If severe doubt arises or innocence appears, the suspect may be released without suffering the stigma of a formal charge, and the police may proceed to other matters.

To be sure, there are cases—and numerous federal violations are among them—where arrests are made on the basis of a warrant or even an indictment itself procured after an exhaustive investigation. In such circumstances, the need to question is minimal, although some questions may be useful to establish identity and to provide an opportunity for exculpatory explanations. In most criminal cases, however, apprehension of the suspect can hardly await an extended preliminary investigation. Even if a warrant for the suspect's arrest has been issued, law-enforcement officers usually have little to go on other than the complaint of the victim or witness and such physical evidence as may then be available.

Nor does post-arrest questioning necessarily result in the institution of formalized proceedings. As we have noted, further investigation may disclose that the arrested suspect is innocent and should be released. In striking the proper balance between permissible and prohibited post-arrest interrogation, it is surely relevant to consider that (*United States* v. *Bonanno*, 180 F. Supp. 71, 82–83 (S.D.N.Y.)):

> [t]here are many occasions where a man appears guilty enough to be arrested and arraigned, when in fact he is entirely innocent of wrong-doing. This innocence may be easy to establish, once the suspect is allowed to give his story to the police. * * * The true and ultimate end [in restricting the right of the police to investigate] is to protect innocent persons from false charges. If allowing law enforcement officers to question persons as part of the investigation of a crime, will further this end, forbidding that procedure would divert us from the objective.

And see *Metoyer* v. *United States*, 250 F. 2d 30, 33, (C.A.D.C.):

> If police are compelled to arraign all potential suspects before questioning any of them we shall have used the artificial niceties and superficial technicalities concerning our liberties to reduce genuine and important rights to absurdity—and dangerous absurdity at that. Every citizen has a right to insist that the police make some pertinent and definite inquiry *before* he may be arraigned on a criminal charge, which even if it is later abandoned inflicts on him a serious stigma.

See, also, *Goldsmith* v. *United States*, 277 F. 2d 335, 342–343 (C.A.D.C.), certiorari denied, 364 U.S. 863.[15]

---

[15] In California, in 1960, 28.5% of the persons arrested and "booked" for felonies were released without the filing of a complaint. Significantly, the highest rates of pre-complaint

In addition, questioning and clarification may establish the appropriateness of a lesser charge than that initially contemplated.[16]

No less important is the fact that questioning will often provide the only realistic key to the solution of other offenses and the identification of other offenders. When evidence points to a suspect as the perpetrator of an offense under investigation, it may also suggest his involvement in other offenses of a similar nature. Routine questioning before the suspect is released on bail may provide the only practical means of clearing up a series of previously unsolved cases involving a

---

release occurred in cases of robbery (42.6%), aggravated assault (32.2%), and burglary (32.5%). The lowest rate was in connection with forgery and bad-check cases (10.3%), where the need for arrest prior to investigation is less. Barrett, *Police Practices and the Law—From Arrest to Release or Charge*, 50 Calif. L. Rev. 11, 31–35 (1960). Similar statistics have appeared in the following years. State of California, Bureau of Criminal Statistics, Department of Justice, *Crime in California* 1961–1964.

[16] In 1960, 21.6% of California felony arrests eventuated, after questioning, in misdemeanor complaints. *Barrett, supra*, at 31–35.

similar *modus operandi*. Questioning in such cases has proved "very fruitful. Even if no prosecution for these other offenses is contemplated, it does allow the police to clear from their books a number of offenses and consequently directs police resources to other outstanding crimes." LaFave, *Detention for Investigation by the Police: An Analysis of Current Practices*, 1962 Wash. U.L.Q. 331, 380.[11] Similarly, in a crime involving several confederates, interrogation of an arrested suspect may be the only means by which the police can hope to ascertain the identities of his accomplices, or, if a criminal organization is involved, of his superiors. Professor LaFave's study indicates that questioning for this purpose is generally short, since "it usually is possible to convince the arrestee to name his more fortunate colleagues or else it becomes apparent that he will not provide the police with this information." LaFave, *supra*, at 383.

Routine preliminary interrogation for any of the preceding purposes may be—and it commonly is—quite brief. Characteristically, it occurs sporadically during the time a suspect spends waiting for the completion of administrative formalities. See LaFave, *Arrest: The Decision to Take a Suspect into Custody*, 386 (1965). Yet, as noted by Professor Barrett in his California study, despite the fact that "in the overwhelming percentage of cases the interrogation times * * * were * * * surprisingly short", they were also "surprisingly productive". Barrett,

[11] Professor LaFave noted one case in Detroit where the suspect acknowledged the commission of 127 unsolved felonies.

*Police Practices and the Law—From Arrest to Release or Charge,* 50 Calif. L. Rev. 11, 45 (1960).[18]

For the above reasons, we believe that limited post-arrest interrogations are reasonably necessary in the administration of a system of criminal law. This Court observed in *Lopez* v. *United States,* 373 U.S. 427, 440:

> The function of a criminal trial is to seek out and determine the truth or falsity of the charges brought against the defendant. Proper fulfillment of this function requires that, constitutional limitations aside, all relevant, competent evidence be admissible, unless the manner in which it has been obtained—for example, by violating some statute or rule of procedure—compels the formulation of a rule excluding its introduction in a federal court. * * *

Whatever proof is obtained in the course of post-arrest questioning and such subsequently discovered evidence as is attributable to the interrogation should,

[18] In one city studied, 49.4% were questioned for 30 minutes or less, 24.8% for 30 minutes to one hour, and 15.5% for one to two hours. Either confessions or admissions were given by 58.1% of all persons arrested, and 75.6% of all persons eventually charged. In another city, 27.1% were questioned for 30 minutes or less, 22.0% for 30 minutes to one hour, and 35.6% for one to two hours. Either confessions or admissions were given by 88.1% of all persons arrested, and 89.6% of all persons eventually charged. Barrett, *supra,* at 42–44. Results of the preliminary staff study by the National Crime Commission show that in the District of Columbia 37.7% of the confessions or admissions were given after questioning for 30 minutes or less, 29.9% after questioning for 30 minutes to one hour, and 25.1% after questioning for one to two hours. Approximately one-half of the persons arrested made either confessions or incriminating admissions.

therefore, be admissible in the arrested suspect's criminal trial so long as the questioning did not infringe upon his constitutionally guaranteed rights. It is to these rights that we now turn.

### 2. THE RIGHTS OF THE ACCUSED

#### A. THE FIFTH AMENDMENT PROTECTION AGAINST COMPELLED SELF-INCRIMINATION

The Fifth Amendment secures the right of an accused not to "be compelled in any criminal case to be a witness against himself." At the time of the amendment's adoption, the framers consciously contemplated only the sort of "compulsion" provided by the legal process—*i.e.*, the duty to testify before a court, grand jury or legislative body as enforced by the penalties for contempt and perjury. See, generally, 8 Wigmore, *Evidence* §§ 2252, 2266 (McNaughton rev. 1961); McCormick, *Evidence*, § 123 (1954). It has long been recognized, however, that the policies underlying the privilege may be violated by informal compulsion exerted by a law-enforcement officer acting under color of authority. See McNaughton, *The Privilege Against Self-Incrimination*, 51 J. Crim. L.C. & P.S. 138, 151–152 (1960). We have no doubt, therefore, that it is possible for a suspect's Fifth Amendment right to be violated during in-custody questioning by a law-enforcement officer.

In the case of a witness who has been subpoenaed to testify, compulsion, if applied, is exerted in a formalized manner by the exercise of a court's contempt powers. Any compulsion present during police interrogation, on the other hand, arises out of the suspect's physical and mental condition while he is in custody. The presence or absence of official conduct exerting an impermissible coercive influence on the suspect is, in our view, the crucial matter to be determined in deciding whether the suspect was "compelled * * * to be a witness against himself" in the constitutional sense. That is very largely a factual issue which must be appraised in each case.

We agree that if a suspect's post-arrest statement is the product of compulsion or overreaching by law-enforcement officers, it has been obtained in violation of the Fifth Amendment and is inadmissible as evidence of his guilt. Even if the reliability of the confession is unquestioned, the Fifth Amendment bars its use against the accused. See *Malloy* v. *Hogan,* 378 U.S. 1, 7–8; *Bram* v. *United States,* 168 U.S. 532, 542.

If a suspect in custody knows, however, that he is under no legal obligation to answer police questions (see pp. 35–37, *infra*) and if no other coercion, overreaching or impermissible influence over the free exercise of his volition is imposed by those who hold him in custody, he may freely determine whether or not to make self-incriminatory admissions. The right to make that decision uninhibited by official compulsion

is what the Fifth Amendment protects.[19] What it guarantees is the accused's "*free choice* to admit, to deny, or to refuse to answer" (*Lisenba* v. *California*, 314 U.S. 219, 241 (emphasis added)), and the right to determine "in the unfettered exercise of his own will" (*Malloy* v. *Hogan*, 378 U.S. 1, 8) whether or not "to be a witness against himself."[20]

Neither the fact that the suspect is in police custody nor the fact that he is asked questions is, in and of itself, so definitive a circumstance as to render an admission "compelled" in the Fifth Amendment sense.

---

[19] The generalized "right to be silent" arises simply from the lack of any legal obligation to speak.

[20] There is no substance to the suggestion that the making of an incriminatory disclosure of itself proves that the system of Constitutional safeguards has broken down because no rational man would ever incriminate himself voluntarily. Statements useful in establishing guilt, but amounting to far less than a confession, are a common product of an inept attempt at an exculpatory explanation or a denial of guilty knowledge. And the great majority of clear admissions or confessions are prompted either by conscience, by a desire to get the matter over with, or by a calculated design to secure more favorable treatment. This has been recognized by the courts (*e.g.*, *United States* v. *Drummond* (C.A. 2), December 2, 1965, slip opinion, p. 3441, certiorari pending, No. 1203 Misc., this Term; *United States* v. *Fay*, 323 F. 2d 65, 72 (C.A. 2), certiorari denied, 376 U.S. 915; see *Culombe* v. *Connecticut*, 367 U.S. 568, 576; *United States* v. *Cone*, November 22, 1965, slip opinion, p. 3406, certiorari pending, No. 1027 Misc., this Term), by legal scholars (3 Wigmore, *Evidence* § 851 at 319 (3d ed. 1940)), and by psychiatrists (Reik, *The Compulsion to Confess*, 267–268 (1959)).

Although there can be little doubt that detention in police headquarters has some influence on the person arrested, this Court has never held that it is so inherently coercive that all statements made while in custody are *ipso facto* involuntary. Such a rule would, of course, totally eliminate post-arrest interrogation which, as we have previously demonstrated, is an essential tool in law enforcement. And while there can similarly be no doubt that questioning increases the likelihood that the suspect will speak, the right—indeed, the duty[21]—to question in these circumstances has consistently been sustained. Mr. Justice Frankfurter summarized the governing principle in *Culombe* v. *Connecticut*, 367 U.S. 568, 589–591:

> * * * [T]his Court (in cases coming here from the lower federal courts), the courts of England and of Canada, and the courts of all the states have agreed in holding permissible the receipt of confessions secured by the questioning of suspects in custody by crime-detection officials. And, in a long series of cases, this Court has held that the Fourteenth Amendment does not prohibit a State from

[21] See *United States* v. *Del Llano* (C.A. 2), December 22, 1965, slip opinion, p. 3571; *United States* v. *Cone* (C.A. 2), November 22, 1965, slip opinion, p. 3397–3398; certiorari pending, No. 1927 Misc., this Term; *United States* v. *Robinson* (C.A. 2), November 22, 1965, slip opinion, p. 3379, certiorari pending, No. 1167 Misc., this Term; *Goldsmith* v. *United States*, 277 F. 2d 335 (C.A. D.C.), certiorari denied, 364 U.S. 863.

> such detention and examination of a suspect as, under all the circumstances, is found not to be coercive. * * *

See also *United States ex rel. Williams* v. *Fay*, 323 F. 2d 65, 72 (C.A. 2) (concurring opinion), certiorari denied, 376 U.S. 915.[22]

More difficult questions are presented when officers engage in conduct which might not be coercive in isolation but which has the effect, in the atmosphere of a police station and in the context of a police interrogation, of substantially influencing the suspect's volition. Recent decisions of this Court such as *Haynes* v. *Washington*, 373 U.S. 503, and *Lynumn* v. *Illinois*, 372 U.S. 528, are illustrative in this regard. In *Haynes*, the Court held inadmissible a confession which had been obtained "only after consistent denials of [the suspect's] requests to call his wife, and the conditioning of such outside contact upon his accession to police demands." 373 U.S. at 514. While observing that "interrogation of witnesses and suspects * * * is undoubtedly an essential tool in effective law enforcement," the Court held that the Due

[22] The right not to be asked questions extends only to a defendant at his trial on criminal charges—a specialized situation where calling an unwilling defendant as a witness and questioning him before the trier of fact might permit an ineradicably prejudicial inference of guilt to be drawn from his refusal to answer.

Process Clause of the Fourteenth Amendment[33] had been violated because of the "effect of psychologically coercive pressures and inducements on the mind and will of an accused." 373 U.S. at 515. In *Lynumn*, this Court reversed a conviction which was based, in part, upon a confession obtained in the accused's home by arresting officers who threatened that State financial aid for her children would be cut off and the children taken from her if she did not cooperate. The Court held that, under the circumstances, the confession was not "the product of a rational intellect and a free will." 372 U.S. at 534.

That test is, in our view, the one that should govern these and similar cases. While mere detention and interrogation do not invalidate admissions made while the suspect is in custody, other conduct by those who have him in custody and interrogate him may so significantly affect his free will that it can be said to have been overborne. The length of an interrogation is, quite obviously, a significant element in determining whether the police conduct amounted to over-

[33] Although the Court did not expressly refer to the protection against compulsory self-incrimination, that constitutional right—since held to have been absorbed by the Fourteenth Amendment (*Malloy* v. *Hogan*, 378 U.S. 1)—has occasionally been relied upon as support for the rule requiring the exclusion of coerced confessions. See *Bram* v. *United States*, 168 U.S. 532, 542; cf. *Hardy* v. *United States*, 186 U.S. 224, 229; *Wan* v. *United States*, 266 U.S. 1, 14–15.

reaching. Similarly, police denials of a suspect's reasonable requests to see a member of his family, a close friend, or an attorney must weigh heavily in the decision whether he was permitted freely to exercise the choice guaranteed to him by the Fifth Amendment.

*Escobedo* v. *Illinois*, 378 U.S. 478, was, we believe, a case which turned substantially on factors such as these. Although much of the Court's decision in *Escobedo* is couched in Sixth Amendment terms, the Court was careful to limit its holding to a situation in which (378 U.S. at 490–491)

> the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent * * *.

All but the first of these factors are, we submit, relevant to a determination whether, under all the circumstances, the suspect's statement was obtained by coercion, by overreaching, or by some other impermissible influence over the exercise of his constitutional privilege not to be compelled to incriminate himself. In determining whether a suspect has spoken freely, it is significant that he requested an opportunity to

consult his attorney and that such a request was refused. It is also significant that although at the outset he was told of his Fifth Amendment right (378 U.S. at 499; see 378 U.S. at 480, n. 1, 485, n. 5), he was thereafter handcuffed and interrogated by police for the purpose of obtaining a confession of guilt (378 U.S. at 483) without being told again that he was under no compulsion to confess. The police actions in *Escobedo* plainly spoke louder than their earlier words of warning. There was good reason to conclude that the defendant in fact had no freedom of choice "to admit, to deny, or to refuse to answer," so that his confession was improperly admitted.

Another important element in deciding whether a suspect has exercised the "free choice" guaranteed by the Fifth Amendment is whether he was cognizant of his legal rights, including the rule that he is under no legal obligation to answer questions. As Mr. Justice White, dissenting in *Escobedo* v. *Illinois,* 378 U.S. 478, 499, observed, the "failure to inform an accused that he need not answer and that his answers may be used against him is very relevant indeed to whether the disclosures are compelled. * * * If an accused is told he must answer and does not know better, it would be very doubtful that the resulting admissions could be used against him." Several of the State cases now before the Court (though not the instant case) involve unwarned admissions. Our view is that while the failure to give such a warning warrants a

scrupulous judicial examination of the surrounding circumstances and may, in many cases, be decisive, it does not, *ipso facto,* invalidate subsequent admissions. A suspect who does not know that he is under no legal obligation to answer at all may be presumed to be ignorant, as well, of his constitutionally guaranteed option not "to be a witness against himself." His awareness or lack of awareness of the alternatives open to him bear upon the question whether he reached a determination to speak "in the unfettered exercise of his own will." *Malloy* v. *Hogan,* 378 U.S. 1, 8.[24] But this does not mean that any statement made in answer to questions which have not been preceded by a warning is necessarily attributable to the interrogating officer's failure to warn. If it can be shown that the suspect was fully aware of his legal rights—if he was, for example, an experienced criminal lawyer—the failure to warn obviously did not influence his determination to speak. And even if he did not know of his rights not to answer and to refuse to incriminate himself, the other circumstances of the interrogation may demonstrate that this ignorance did not contribute to the making of the admissions. The question ultimately is whether the totality of

[24] For this reason, F.B.I. agents, as a matter of invariable practice, give such a warning before they question a person under arrest, or, in many instances, even those not under arrest. See Hoover, *Civil Liberties and Law Enforcement: The Role of the FBI,* 37 Iowa L. Rev. 175, 182 (1952).

the circumstances under which the admissions were made, including the conditions under which the interrogation was conducted, the length of the questioning, the freedom given to the suspect to communicate with members of his family, with friends and with an attorney, the suspect's awareness of his legal rights and privileges, and the suspect's personal characteristics—including his age, education and intelligence—indicate that his statements were obtained by overreaching or by a coercive influence over the exercise of his constitutional privilege not to incriminate himself.

We recognize that this test is not capable of mechanical application; it requires an individualized examination of the facts of each particular case. These facts may, of course, be difficult to appraise. The defendant's interest in casting the police in the worst possible light and the police's interest in justifying their conduct inevitably color the testimony of both sides. A judicial attempt to reconstruct the circumstances may produce testimony which is in square conflict,[25] particularly when interrogation has been ex-

[25] Legislative proposals have been drafted to reduce the testimonial conflicts. The proposed Model Code of Pre-Arraignment Procedure provisions of the American Law Institute provide for tape recording of any post-arrest interrogation. See Council Draft No. 1, ALI Model Code of Pre-Arraignment Procedure, § 4.09 (1965).

tended over a protracted period of time.[25] Notwithstanding these difficulties, we believe that this standard—which is consistent with the course of this Court's decisions—is the most desirable means of promoting fairness in law enforcement without sacrificing effectiveness. An inflexible constitutional rule turning on the presence or absence of counsel or on the recitation or omission of a warning may be easier to apply, but we believe that it will, more often than not, cast out the baby with the bath.

B. THE SIXTH AMENDMENT GUARANTEE OF THE ASSISTANCE OF COUNSEL

The Sixth Amendment guarantees an accused "[i]n all criminal prosecutions" the right "to have the Assistance of Counsel for his defence." Apart from *Escobedo* v. *Illinois*, 378 U.S. 478, which we discuss below, no decision of this Court has suggested that the "defense" of the "criminal prosecution" to which the amendment refers begins prior to appearance before a

[25] The desire to find a simpler method of determining admissibility has doubtless contributed to this Court's attempt to lay down more precise rules as to when a confession is or is not admissible. This was recognized to be a primary factor in the Court's enforcement of Rule 5(a), F.R.Crim.P., which requires an arrested person to be brought before a judicial officer without unnecessary delay. *Mallory* v. *United States*, 354 U.S. 449; *McNabb* v. *United States*, 318 U.S. 332. The *McNabb-Mallory* rule constituted an "experiment * * * made in an attempt to abolish the opportunities for coercion which prolonged detention without a hearing is said to enhance." *Brown* v. *Allen*, 344 U.S. 443, 476.

judicial officer. In jurisdictions where the presentation of an accused before a magistrate for a preliminary hearing is a critical stage of the criminal proceeding, the right to counsel has been held applicable at that point. Such a hearing is a part of a "criminal prosecution", the suspect has become an "accused", and he must then begin the preparation of his defense. *White* v. *Maryland,* 373 U.S. 59; *Hamilton* v. *Alabama,* 368 U.S. 52. Similarly, the return of an indictment or information marks a point where a "criminal prosecution" begins and where a suspect has become an "accused." *Massiah* v. *United States,* 377 U.S. 201. We believe, however, that there is no general right to counsel under the Sixth Amendment prior to the institution of formal proceedings before a magistrate or court. Assistance of counsel under the Sixth Amendment relates to the right to have counsel defend a case. An arrest does not necessarily result in a "criminal prosecution" even though the arrest is based on probable cause. There may be no prosecution at all, and, if a prosecution is brought, the subject may be quite different in character from what the original charge was thought to be.

Any attempts to import rigid Sixth Amendment concepts into the whole range of investigation for all types of crimes, including the myriad daily problems requiring investigation by local police, is beset with enormous practical difficulties. The daily problems of law enforcement are totally different from the prob-

lems presented in the investigation of dramatic crimes like murder. In the ordinary type of crime, as we observe at pp. 20–22, *supra*, it is the immediate statement, even if exculpatory, made at or near the time of the arrest which is the most significant instrument of law enforcement. In practice, such questioning would be virtually precluded if the government were required to assure that every suspect under arrest had the advice of an attorney. As we have already stressed, the relevant right of a person interrogated by the police is a right not to be *compelled* to incriminate himself; it is not a right to plan the best legal strategy with respect to a case which may or may not develop. The Sixth Amendment right to counsel, if it applies in this situation at all, essentially buttresses the suspect's Fifth Amendment right. It is "the right of the accused to be advised by his lawyer of his privilege against self-incrimination." *Escobedo* v. *Illinois*, 378 U.S. 478, 488. As such, the advice would merely assure the suspect that he had a "free choice to admit, to deny, or to refuse to answer." *Malloy* v. *Hogan*, 378 U.S. 1, 8. If that choice is otherwise made clear to a defendant, there is no reason to hold that he must, as a matter of constitutional right, be warned by a lawyer at that stage.

Nor can the Sixth Amendment be made to apply at the instant when the police conduct shifts from the "investigatory" to the "accusatory" state. In most run-of-the-mill crimes, it is impossible, even conceptually, to separate "investigatory" and "accusatory" stages.

A person caught red-handed committing a burglary may be the accused with respect to that crime, but he is not the accused, although he may be suspected, in the commission of ten other burglaries in the same neighborhood during the same period of time. A person found in possession of narcotics may well be the subject of investigation, not accusation, because the agents may be more interested in discovering whether he is a lone operator, the head of the venture, or merely a minor figure in a large ring. If two persons are known to have committed a bank robbery and one is arrested, his interrogation may well be directed more to gathering information about the confederate than to eliciting a confession from the accused. Even if a suspect is arrested for the commission of a particular crime, the investigatory function has not ended. It may develop that the crime for which he was arrested is less or more serious than the offense actually committed.

Moreover, we most seriously question whether it is in the interest of defendants as a class to consider the "investigatory" phase of a case ended with an arrest based on probable cause. Policemen and other investigators are busy, overworked people. Where responsibility ends, interest tends to lapse. Consequently, if an "investigation" ends with arrest and investigatory responsibility for a case ceases at that juncture, it is reasonable to expect reduced efforts to resolve uncertainties which exist at the time of arrest.

Such resolution might aid a defendant as much as harm him, more perhaps in fixing the exact nature of his crime and of his involvement therein than in establishing innocence.

*Escobedo* v. *Illinois,* 378 U.S. 478, involved unique circumstances which account for the holding that a Sixth Amendment right had been infringed even though the accused had not yet been formally charged. In *Escobedo* this Court concluded that the suspect's attorney had intentionally been denied access to his client notwithstanding the latter's request because it was the purpose of the police "to 'get him' to confess his guilt despite his constitutional right not to do so." 378 U.S. at 485. There was, in other words, sufficient foundation in the record to suppose that law-enforcement authorities had purposefully delayed the filing of formal charges in order to keep the suspect and his attorney apart and thereby facilitate the obtaining of a confession. As Judge Friendly observed in *United States* v. *Cone* (C.A. 2), slip opinion, p. 3412, certiorari pending, No. 1027 Misc., this Term, "It would make a mockery of these decisions if the police or the prosecutor could postpone the accrual of the precious right to the Assistance of Counsel by unduly delaying the initiation of the criminal prosecution." Factual situations such as those involved in *Escobedo* are rare, and the recognition of a Sixth Amendment right prior to formalized charges in the special circumstances of that case should not, we believe, be deemed precedent for the formulation of a general rule regarding the right to counsel upon arrest.

Nor does the equal protection clause require that counsel be provided at all post-arrest interrogations to

advise suspects who do not at that point have a lawyer. To overcome any suggestion of compulsion which might violate the protection afforded by the Fifth Amendment, we assume that the police should permit a suspect in custody to consult with his retained attorney if he wishes to do so. But it does not follow that they must furnish similar appointed counsel to those who do not have one immediately available. There is, as we have observed, no constitutional right to the assistance of counsel at this juncture. This means that a suspect under arrest but not yet formally charged has the same right to consult an attorney as he had before arrest. The right involved in both pre-arrest and post-arrest investigations is the Fifth Amendment right not to be compelled to give self-incriminatory information. A particular defendant may be able to exercise that right at both stages with the assistance of counsel, but that does not impose on the State or federal government the duty of providing counsel similarly to assist all defendants in the exercise of that right.[27]

[27] It has, from time to time, been suggested that provision of counsel at this stage is necessary to achieve equality between rich and poor. This argument oversimplifies the problem. Many persons who are not poor do not have ready access to lawyers immediately available to appear at a police station. If equality is to be the overriding objective, the government would be under an obligation to provide a lawyer for anyone in that situation—whether rich or poor. The courts and the Bar are attempting to meet the substantial difficulties deriving from the constitutional requirement of counsel at and after arraignment. As observed above, there would be overwhelming practical difficulties if all law-enforcement authorities, both State and federal, were required to provide counsel at the stage of arrest.

The remaining question is whether, in interrogating a person who has been arrested, officers must tell him that he may consult with counsel if he chooses to do so. Since, for the reasons discussed above, we believe that the essential constitutional right which governs questioning by police after arrest is the Fifth Amendment right not to be compelled to incriminate oneself, rather than the Sixth Amendment right to have counsel for one's defense, we do not believe that any such warning is required as a matter of constitutional right. The proper inquiry is whether the accused has been *compelled* to incriminate himself. A statement such as was given in the present case—that an accused may, if he wishes, consult with counsel—may properly be considered one factor rebutting a claim of compulsion. But we do not think it in and of itself determinative of the essential question whether the accused has been compelled to incriminate himself in violation of the Fifth Amendment.

### 3. CURRENT STUDIES AND PROPOSALS

In urging this Court to decide the five cases now before it on the basis of established constitutional doctrine interpreting the Fifth Amendment rather than by a novel application of the Sixth Amendment, we particularly wish to draw to the Court's attention the considerable examination of pre-arraignment procedures now being conducted under the auspices

of federal, State and private agencies. It is doubtless true that, until recently, neither the police's need to question nor the suspects's need for counsel and warning were subject to systematic empirical evaluation. However, significant studies are now underway. The National Crime Commission, the District of Columbia Crime Commission, the American Bar Foundation and the Georgetown University Law Center are undertaking independent empirical examinations of the role of in-custody questioning in crime detection and law enforcement. The results of these studies should be of no little value. Concrete knowledge of the realistic problems and needs of law-enforcement officers will obviously contribute in great measure to the fashioning of workable rules by legislatures and court alike.

Equally important is the fact that courts and scholars are currently re-evaluating the rights accorded to those suspected of crime. The American Law Institute, after comprehensive study, is drafting a general code of pre-arraignment procedure which deals with these problems and which would generally confer greater protection on an arrested suspect than is provided in most jurisdictions. Not all examinations will, of course, produce proposals for change, nor will all change be adopted. But the significant fact is that "practical opportunities" (Clark, J., concurring, in *Baker* v. *Carr*, 369 U.S. 186, 259) for reform and experimentation exist, and they are, in fact, being utilized.

We believe that the need to fashion and implement procedures improving both efficiency and fairness in the administration of the criminal law can best be filled by legislative deliberation and action. For example, safeguards of private rights which cannot be incorporated in a constitutional principle (see, *e.g.*, note 25, *supra*) may be prescribed by statute or court rule. In some instances, sanctions for willful violations by the police can be more effectively administered by statute than by an exclusionary rule. Differing local conditions which might warrant differences in the powers given the police may be explicitly recognized in statutes more satisfactorily than by inflexible constitutional rules.

The important consideration in this regard is that study has been spurred and that some experimentation with new procedures is now taking place in various jurisdictions. The freedom to experiment, to try new rules, to apply fresh approaches to old problems—these are the stuff of legal evolution. Judge Friendly recently observed that this Court "does not stand alone" in securing the rights guaranteed by the Constitution and that it "should welcome the aid that legislatures may now be ready to offer in discharging the grave responsibilities of the due administration of criminal justice." Friendly, *The Bill of Rights as a Code of Criminal Procedure,* 53 Calif. L. Rev. 929, 956 (1965). This circumstance weighs heavily, we believe, in favor of deciding these cases on the basis of established constitutional principles.

In urging this, we emphasize our conviction that there is no need to fashion new rules of constitutional dimension in order to make a just disposition of the cases at bar. The Court is in a position to examine the totality of circumstances in each of the cases before it. Applying the essential principles established by its past decisions (including, of course, the recent ruling in *Escobedo*), the Court may determine in each instance whether law enforcement officials have engaged in conduct which coerces or overreaches—whether, in brief, the conduct has been such as to undermine the individual's meaningful exercise of his privilege to speak or to remain silent.

## SUMMARY OF ARGUMENT

### I

Petitioner's statements to the F.B.I. agents, given after he had been fully warned of his rights, were properly admitted in evidence. The record, which is incomplete because of petitioner's failure to object to the admission of the statements, permits the inference that petitioner, an experienced criminal who had admitted his implication in State offenses, chose to confess to the F.B.I. agents because he preferred federal to State prosecution. There is no evidence whatever that coercion was exerted in any form.

This case involved no violations of the principles enunciated by this Court in *Escobedo* v. *Illinois*, 378 U.S. 478. The F.B.I. agents' investigation had not,

at the time of the interrogation, focused upon petitioner as the person who committed the bank robberies. The case could not be said to have passed, in any sense, from the "investigatory" to the "accusatory" stage. Moreover, petitioner was warned that he did not have to make a statement, that any statement he made could be used against him, and that he had a right to see an attorney before he made the statements. Petitioner expressed no desire to speak to an attorney and confessed immediately without further questioning.

## II

The confessions to the F.B.I. agents were not obtained during a period in which State and federal officers were cooperating to deprive petitioner of any rights. Petitioner was properly in State custody for local crimes and had been arrested, searched and questioned by State officers. There was, at the time of the questioning by F.B.I. agents, no legal duty under State law upon the State officers to bring petitioner before a judicial officer. The State officials had no part in the investigation of the federal bank robberies. All that the State officers did was permit the federal agents to interview petitioner where he then was, which happened to be State custody. Neither this permission, nor the fact that the State later turned petitioner over to the federal authorities for federal prosecution converted the State custody retroactively

into federal custody giving rise to an obligation under Rule 5(a), F.R. Crim. P. *United States* v. *Coppola*, 281 F. 2d 340 (C.A. 2), affirmed *per curiam*, 365 U.S. 762.

III

There was no objection at petitioner's trial to the admission of petitioner's topcoat, taken from his automobile after arrest. Hence the court conducted no inquiry to determine whether petitioner had consented to the search, as he had to the search of his hotel room. The topcoat was not, in any event, significant evidence since petitioner's confessions and detailed identification by eyewitnesses conclusively proved petitioner's guilt.

IV

The provisions of Section 2113(d) providing a greater penalty when, in perpetrating a bank robbery, life is put in jeopardy by use of a dangerous weapon merely define an aggravated form of such robbery. It was proper, therefore, to charge the offense in one count. It was not necessary for the government to prove, in establishing commission of the offense, that the gun was loaded. The decisions uniformly hold that when a robber displays a gun to back up his demands and when, in addition, threats are made, it is proper to infer that the gun was loaded. The evidence in this case justified such an inference.

## ARGUMENT

### I

### PETITIONER'S STATEMENTS TO THE F.B.I. WERE FREELY GIVEN WITH FULL KNOWLEDGE OF HIS CONSTITUTIONAL RIGHTS

Petitioner initially challenges the admissibility of his confessions on the grounds that they were obtained under coercive circumstances (Br. 16–37). This claim was not made in the district court; indeed, petitioner did not object to the admission of the statements. As a consequence of his failure to object, the record does not disclose the details regarding the conditions under which he was kept in custody. There being no occasion to do so, the prosecution did not develop in the record at petitioner's trial the circumstances under which the F.B.I. agents arrived at the police headquarters to interview petitioner; nor were the agents or the police asked as to describe with particularity the exact sequence of events from the time petitioner was arrested until he made the relevant admissions. Petitioner takes advantage of the record's silence—which is attributable to his failure to object—to claim that his detention was "secret" (Br. 12, 13, 22, 32, 35, 38, 46; see Br. 20, 25, 48) and that he was held "incommunicado" (Br. 10, 20, 37, 38, 42, 47). These characterizations are, we submit, totally unfounded.

A. THERE IS NO BASIS FOR A CLAIM OF COERCION OR OVERREACHING

Because of petitioner's failure to object to the admission of his confessions in evidence, the court conducted no inquiry to determine whether the statements were freely given. There is, however, no suggestion in the record of physical or mental coercion of any sort; such testimony as there was indicates that petitioner was under no duress whatever (see, *e.g.*, R. 81).

On the facts of the case and this skimpy record, it is not at all unlikely that petitioner, an experienced forty-four-year-old criminal who had been identified and admitted his implication in State offenses, made a deliberate choice that he would prefer a federal to a State prison. By admitting his guilt to the F.B.I. he increased the likelihood that this would be the result. It is significant, in this regard, that at the time of sentencing petitioner acknowledged to the trial judge that from his "previous experience" he was aware that a State sentence on the same charges could entail a much greater penalty than he received (R. 95).

Petitioner had robbed, at gunpoint, financial institutions in Sacramento, California. He committed each offense in broad daylight without any attempt to conceal or disguise his features (R. 5; see R. 19, 27–28). Each robbery was conducted during normal business hours in the presence of numerous customers and a full staff of employees. Although the offenses

were committed quietly, most of the witnesses were aware of what had transpired (see, *e.g.*, R. 11, 12, 21), and, in the course of the robbery, they availed themselves of the opportunity to scrutinize petitioner's features (see R. 5, 25–28; II Tr. 26). Petitioner's sole chance of avoiding conviction for the robberies was not to be arrested.[28] If suspected, he would be subject to identification by the many witnesses, and once identified, the evidence would be overwhelming.

When arrested in Kansas City for two local holdups, petitioner was identified in a lineup (R. 40, 43, 46) and he then admitted at least one of the charges (R. 76–78; II Tr. 208). The record establishes that he subsequently admitted his guilt in the Sacramento robberies without pressure or inducement of any sort and after his rights were fully explained (R. 63, 73, 82). We think that the reasonable inference, in light of the manner in which petitioner had committed his offenses, is that he knew he could make no exculpatory explanation or offer any other defense. In these circumstances, he preferred federal to State prosecution.

---

[28] When one teller, whose till was being emptied by Mr. Patella into petitioner's sack, asked what was going on, a customer standing "shoulder to shoulder" with petitioner explained that "he is being robbed." Petitioner turned to the customer and told her to "shut up." (R. 28). The customer obtained a very close view of petitioner's face (R. 27–28).

After the first robbery, petitioner traveled to Kansas City, Missouri, and later returned to Sacramento just long enough to commit the second robbery, leaving immediately for Kansas City (R. 66–67).

This is confirmed by the fact that the period between the agents' introduction to petitioner and his confessions was markedly brief. The introduction took place "shortly before noon" (R. 71, 80, 84; see R. 62); by "shortly after noon" the detailed statements were being transcribed (R. 71, 83–84).

B. THE FACTS DO NOT BRING THIS CASE WITHIN THE RULE OF ESCOBEDO V. ILLINOIS

Examination of "all the circumstances of the case" as disclosed by the incomplete record establishes, we believe, that, in making his statements, petitioner was not deprived of his Fifth and Sixth Amendment rights, or otherwise denied "that fundamental fairness essential to the very concept of justice." *Escobedo* v. *Illinois,* 378 U.S. 478, 491 (citing *Crooker* v. *California,* 357 U.S. 433, 439–440).

There having been no attack on the admissibility of the confessions at trial, the government had no reason or opportunity to explore their underlying details; there was simply no suggestion of impropriety to rebut. Even without a complete record, however, it is clear that this case involved no violation of the principles enunciated by this Court in the *Escobedo* case.

1. The evidence which the agents had at the time of the questioning had not so focused upon petitioner as the person who committed the Sacramento robberies that the case had passed from the "investigatory" to the "accusatory" stage. (So saying, we do

not mean to imply a belief that such a line is one generally susceptible of effective administration. See pp. 40–42, *supra*.) No indictment had been returned naming petitioner as the robber, no complaint had been filed, no warrant had been issued for his arrest.[29] The record indicates the F.B.I. agents knew only that the two robberies had occurred in Sacramento; that petitioner fit the general descriptions given by the witnesses;[30] that he had a criminal record; and that he had previously been in California. This was enough to suggest that petitioner should be questioned; it was certainly not so conclusive as to justify the abandonment of other inquiries. Even if the agents thought that there was a fair likelihood that petitioner was the robber, they were clearly warranted in attempting to verify their information, which had not reached a stage approaching certainty. Moreover, they were "bound to inquire as to the facts in order to ascer-

[29] The warrant issued by the State of California, to which the F.B.I. had alerted the Kansas City police (see R. 35; Ex. 12, for identification), was, we understand, a warrant for petitioner's arrest as a parole violator.

[30] Petitioner argues that a witness to the savings and loan robbery had identified his photograph before his arrest in Kansas City (Br. 5–6, 18). The witness had stated, however, that she was not sure when she had been shown the pictures and her approximation of the date apparently referred to the first occasion when she had been asked to examine a series of photographs and had been unsuccessful (II Tr. 24–25). Even if she had identified petitioner's photograph before the arrest by Kansas City police, this would not have been enough to bring the investigatory process to a halt, particularly with regard to the bank robbery.

tain what other persons might be involved and where they and the stolen money might be found." *United States* v. *Gorman* (C.A. 2), December 7, 1965, slip opinion p. 265, certiorari pending, No. 1114 Misc., this Term.

This Court expressly said in *Escobedo* that the principles there announced were not intended to affect the power of the police or F.B.I. agents to investigate an unsolved crime by talking to a suspect, even though he might later become the accused. See *Escobedo* v. *Illinois,* 378 U.S. at 492; *Haynes* v. *Washington,* 373 U.S. 503, 519; *People* v. *Dorado,* 42 Cal. Rptr. 169, 179, 398 P. 2d 361, certiorari denied, 381 U.S. 937. If it were held that an "accusatory" stage had been reached in the circumstances of this case when the agents arrived to interrogate petitioner, every possible suspect in a criminal investigation would have to be considered as "accused." Such a broad standard would render the investigatory-accusatory dichotomy meaningless.

2. Before petitioner was questioned concerning the federal offenses, he was fully informed of his rights. The agents explained to petitioner "that he didn't have to make a statement, that any statement he made could be used against him in a court of law and that he had the right to see an attorney before he made the statements" (R. 82; see R. 63–65, 66, 73). The first part of the caution went beyond the Fifth Amendment right to be free from compelled self-incrimination and clearly informed petitioner he was under no

legal obligation to speak. The last part of the warning assured petitioner that, so far as the agents were concerned, he was free to obtain legal advice before speaking. Petitioner was thus fully aware of his "free choice to admit, to deny, or to refuse to answer." *Malloy* v. *Hogan*, 378 U.S. 1, 8.

Even in cases otherwise similar to *Escobedo*, a warning that the subject need say nothing and that anything he does say may be used against him has been considered a sufficient safeguard. A warning of this kind was described by this Court as one of the "critical circumstances" which distinguished *Escobedo* from *Crooker* v. *California*, 357 U.S. 433. See 378 U.S. at 491. If the warning is clearly given, it affords the person questioned the information which the right to counsel, at this stage, was designed to assure. 378 U.S. at 488. So long as the information is imparted in unambiguous terms, its source is not crucial. Petitioner's suggestion that a law-enforcement officer cannot be expected to give an effective warning (see Petitioner's Brief, p. 26) is refuted by the record. Here, the warning was plain; there is no indication that it was not understood; and the surrounding circumstances demonstrate that petitioner was fully aware that he was free to remain silent.

Petitioner was also clearly informed (if he was not already aware) of his freedom to consult an attorney. We do not, of course, believe that a Sixth Amendment right to counsel, as such, attaches on the mere questioning of a person in custody, particularly when, as

here, the questioning was, by any meaningful standard, an investigatory one. The freedom to consult counsel announced by the interviewing agents was pertinent, however, in communicating to petitioner that he could attach reasonable conditions to his election to speak.

Even if the Sixth Amendment had any application here, there is, unlike *Escobedo,* no evidence that petitioner wished to consult counsel before making the admissions. If a suspect is told of the right to consult counsel and makes no request or attempt to exercise that right before making statements, the resulting statements are admissible in evidence. *United States* v. *Drummond* (C.A. 2), December 2, 1965, slip opinion p. 3446–3450, certiorari pending, No. 1203 Misc., this Term; *Davidson* v. *United States,* 349 F. 2d 530, 534 (C.A. 10); *Hayes* v. *United States,* 347 F. 2d 668 (C.A. 8); *Payne* v. *United States,* 340 F. 2d 748 (C.A. 9); *Otney* v. *United States,* 340 F. 2d 696, 702 (C.A. 10); *Jackson* v. *United States,* 337 F. 2d 136, 139–141 (C.A.D.C.), certiorari denied, 380 U.S. 935; see *Pennsylvania* v. *Maroney,* 348 F. 2d 22, 31–32 (C.A. 3). This Court has repeatedly stated that the "mere fact that a confession was made while in the custody of the police does not render it inadmissible." See *McNabb* v. *United States,* 318 U.S. 332, 346; *United States* v. *Carignan,* 342 U.S. 36, 39; *United States* v. *Mitchell,* 322 U.S. 65. This was re-affirmed in *Escobedo,* 378 U.S. at

490, n. 14, where this Court noted that "[t]he accused may, of course, intelligently and knowingly waive his privileges against self-incrimination and his right to counsel either at a pretrial stage or at the trial." There is no support in the decision, and no reason to rule in this case, that the right to consult with counsel extends so far that an accused must have counsel appointed for him before he can be questioned.[21]

## II

PETITIONER'S CONFESSIONS TO F.B.I. AGENTS WERE NOT THE PRODUCTS OF AN IMPROPER "WORKING ARRANGEMENT" BETWEEN THE STATE AND FEDERAL AUTHORITIES.

Petitioner contends (Br. 37–50) that his confessions to the F.B.I. agents were inadmissible as evidence because they were products of the kind of improper "working arrangement" between State officials and federal agents which was condemned by this Court in *Anderson* v. *United States,* 318 U.S. 350. This is not so. Unlike *Anderson,* the arrest here was made on State initiative for State offenses, and the State's detention of petitioner was in keeping with State law. The federal agents (with State per-

[21] The agents did not tell petitioner that an attorney would be appointed if he were unable to afford one, but it is likely that petitioner knew this fact from his prior experiences with the criminal law. Moreover, it is not at all clear that petitioner was indigent. He apparently was able to obtain an attorney at Kansas City (II. Tr. 3–4, Supp. Tr. 7).

mission) merely interviewed petitioner where they found him in order to ask him about offenses in which the State had no interest.

In *Anderson,* the confessions were the product of an improper collaborative effort by State and federal authorities who jointly sought to solve the identical crime—*i.e.,* the dynamiting of TVA-owned power lines and towers. The State officials arrested the suspects illegally (318 U.S. at 352) and detained them in contravention of State statute (318 U.S. at 355–356) for the primary purpose of enabling F.B.I. agents to interrogate them (Record, No. 10, O.T. 1942, pp. 192, 333–334, 427–428, 475, 492). The State sheriff was frequently present during the interrogations by the agents (*id.* at pp. 196, 235, 254–255, 309, 334, 432); he even attended some of the agents' meetings at which the investigation was discussed and courses of action were planned (*id.* at pp. 169–170, 334–335, 436–437, 472–473, 492). The interrogations took place "over a period of six days during which [the suspects] saw neither friends, relatives, nor counsel" (318 U.S. at 353). The confessions were the fruit of those interrogations—the direct product of the improper working arrangement.

The present case bears no resemblance to *Anderson.* Petitioner was lawfully arrested by Kansas City police for the commission of two local robberies. He was transported to the local headquarters building, was placed in a lineup, and was identified by a witness as the holdupman in one of the local offenses.

His automobile was impounded, his hotel room was searched, and he was questioned about the local offenses. All this was done entirely by the local police in their own interest. At 11:45 p.m. he was booked on the local charges. The next morning he was returned to the headquarters building and was again questioned by the local police about the local robberies. It was not until late that morning, when the local police had completed interviewing petitioner, that F.B.I. agents (who had telephoned the night before and stated that they wanted to talk to petitioner about an undisclosed subject) were permitted to see him.

It was then that the federal investigation, relating to entirely separate offenses, began. The State officers did no more than to permit federal agents to interview petitioner at the location where he then was—*i.e.*, in State custody. No local officers were present when the F.B.I. agents talked with petitioner. The agents warned petitioner of his rights, asked about the robberies in Sacramento, and were apparently told promptly that petitioner had committed the offenses. The details and the drafting of the formal statements followed. During this period, however, petitioner was lawfully in the custody of State authorities. At that point his detention was well within the duration authorized by Missouri law. Missouri Revised Statutes, § 544.170 (1951); see Missouri Supreme Court Rule 21.14.

We may assume that the failure of the State officers to take petitioner before a magistrate on the morning following his arrest would have been a violation if the State rule were the same as the federal rule (Rule 5(a), F. R. Crim. P.). It has never been suggested by the Court, however, that there is any constitutional requirement that a State's rules on the subject of arraignment must be the same as the rule adopted by this Court and Congress for federal cases. On the contrary, it has been unfailingly assumed that this is a subject upon which the States may have differing rules—subject, of course, to the requirements of due process, which would undoubtedly forbid a period of indefinite restraint by police without an appearance before judicial officers.

Beyond this, we emphasize that there is nothing in this record to support an inference that anything transpired in the period preceding the questioning by the F.B.I. agents which would cast doubt upon the conclusion that petitioner freely and understandingly elected to answer their questions. It bears repetition that he made no claim of mistreatment and that he made no objection to the admissibility of the statements made to the F.B.I. Indeed, this case is plainly controlled by the recent decision in *Coppola* v. *United States*, 365 U.S. 762. In that case, the defendant was arrested by State officers at 9:30 a.m., who interrogated him during the course of that day without bringing him before a magistrate, in conceded violation of New York's rule (see 365 U.S. at 763, n. 1). That

night, he was interrogated (by leave of the State officers in whose custody he remained) by F.B.I. agents concerning federal offenses. During this latter period, he confessed to the commission of federal crimes. Finding on its review of the record that there had been no involvement by the federal officers in the violation of State law committed by the State officers, this Court affirmed the convictions.

As the record in *Coppola* shows and as the dissenting opinion of Justice Douglas in that case notes, there was cooperation between State and federal authorities both in the sense that there were exchanges of information and in the sense that the former made him available to the latter for interrogation. The thrust of the Court's holding is simply that there was no *forbidden* collaboration in the sense of *Anderson* v. *United States*, 318 U.S. 350—that is to say, no use of the State's processes as a shield for evasion of federal requirements.

The same is surely no less true of the instant case. The sole aid rendered to the local police by the federal agents was to give them the collateral information that the State of California had issued a warrant for petitioner's arrest. The police were interested in petitioner in his role as a local holdup-man; the F.B.I. was interested in him in his role as a California bank robber. Their separate interests led their investigations to coincide only briefly—when, after the initial admissions, a policeman and an agent jointly transcribed the serial numbers of the currency taken from

petitioner's possession.[32] That currency, so far as they then knew, might have proved relevant to either a federal or a local offense. The later search of petitioner's automobile by the same policeman and agent was similarly a joint pursuit of independent interests. The only police assistance directed solely to the federal investigation occurred when the police supplied the F.B.I. with copies of the photographs routinely taken of petitioner.

Cooperation of that sort between State and federal authorities, each in pursuit of its own investigation, is the kind of "[f]ree and open cooperation between state and federal law enforcement officers [which] is to be commended and encouraged." *Elkins* v. *United States,* 364 U.S. 206, 221. The fact that the agents interviewed petitioner while he was in State custody—a necessary step if they were to interview him at all—certainly does not constitute a collaborative deprivation of constitutional or other rights. Nor does the fact that the State ultimately refrained from prosecution make the earlier custody by State officers any the less independent. See *United States* v. *Coppola,* 281 F. 2d 340 (C.A. 2), affirmed *per curiam,* 365 U.S. 762; *Young* v. *United States,* 344 F. 2d 1006, 1010–1011 (C.A. 8), certiorari denied, 382 U.S. 867; *Burke* v. *United States,* 328 F. 2d 399, 403 (C.A. 1), certiorari denied, 379 U.S. 849; *Cram* v.

[32] Contrary to petitioner's suggestion (Petitioner's Brief, p. 43), the numbers were merely transcribed at that time. No "comparison" took place (R. 50–52, 57; Tr. 175; see Gov. Ex. 14).

*United States*, 316 F. 2d 542, 544–545 (C.A. 10); *United States* v. *Sailer*, 309 F. 2d 541, 542 (C.A. 2), certiorari denied, 374 U.S. 835.[33]

## III

### THE ADMISSION IN EVIDENCE OF PETITIONER'S TOPCOAT WAS NOT ERROR

There is no substance to the contention that the admission in evidence of petitioner's topcoat, which occurred without objection, constituted reversible error (Br. 50–52). Because of the absence of objection, the relevant facts were not developed. Petitioner now asserts that the failure to object was attributable to trial counsel's view that objection would have been futile under *Fraker* v. *United States*, 294 F. 2d 859 (C.A. 9).[34] It is equally reasonable, however, to sup-

[33] *United States* v. *Tupper*, 168 F. Supp. 907 (W.D.Mo.), is inapposite. There the State officers, while holding the defendants in illegal State custody, interrogated the defendants "to establish the facts or foundation necessary for a possible federal offense." (168 F. 2d at 908.) They then telephoned the F.B.I., "informed that office concerning defendants' suspected violation of a federal law" (*ibid.*), and remained present and cooperated while federal agents questioned the defendants (168 F. 2d at 909, 911).

[34] In *Fraker*, the question was stated to be "whether the search was so disjoined in time from the arrest as to be no longer incident thereto," and an arrest and search separated by one-and-a-half hours were found "substantially contemporaneous." 294 F. 2d at 862. This hardly would render useless an objection to a delay of over fourteen hours.

pose that petitioner may have failed to object because the facts, if shown, would have established that he had consented to the search of his vehicle, just as he had consented to the search of his hotel room (R. 60–61; Gov. Ex. 15). In any event, counsel's choice was to raise the point and thereby set the stage for an evidentiary hearing on which the relevant facts would be presented or to abandon the claim.

Moreover, the admission of the topcoat was of no substantial significance. It served only as additional identification of petitioner as the perpetrator of the Bank of America robbery. If petitioner's detailed confession was properly admitted, that evidence, the particularized eye-witness descriptions (including petitioner's unusual features (R. 27) and the location of the tattoo on his left hand (R. 17–18)), and evidence of his possession of marked currency taken from the bank, overwhelmingly proved his identity as the robber.[35]

## IV

### THE EVIDENCE SUPPORTS PETITIONER'S CONVICTION FOR THE AGGRAVATED FORM OF BANK ROBBERY

Petitioner argues that it was improper to charge in one count both that he committed a bank robbery

[35] *Fahy* v. *Connecticut*, 375 U.S. 85, did not, as petitioner suggests, hold that there can be no harmless error in the admission of illegally seized evidence. *Fahy* simply held that, on the facts of the case, the error in the admission of the evidence was prejudicial. 375 U.S. at 91–92.

and that in so doing he endangered life by the use of a dangerous weapon (Br. 56–60). He also contends that this was prejudicial because the evidence did not establish that the gun which he used was loaded.

It is, however, well established that 18 U.S.C. 2113 (d), which permits increased punishment if, in the course of a bank robbery, life is placed in jeopardy by use of a dangerous weapon, does not create a separate offense, but merely defines an aggravated form of the offense defined in subdivision (a). *Holiday* v. *Johnston,* 313 U.S. 342, 349. The offense was therefore properly charged in one count.

It was not necessary for the government affirmatively to prove in the first instance that the gun was loaded.[36] The cases uniformly hold that, when a robber displays a gun to back up his demands, and particularly when, in addition, threats are made, the finder of fact may fairly infer that the gun was loaded. *Wagner* v. *United States,* 264 F. 2d 524, 530 (C.A. 9), certiorari denied, 360 U.S. 936; *Wheeler* v. *United States,* 317 F. 2d 615 (C.A. 8); *United States* v. *Roach,* 321 F. 2d 1, 5 (C.A. 3). At the very least, it is fair to presume that the gun is loaded until the

[36] Petitioner admits that the instructions of the trial court, to which there was no exception, adequately placed before the jury the necessity of specifically determining whether he committed the aggravated form of the offense, *i.e.*, that life had been put in jeopardy by use of a dangerous weapon. The court defined a dangerous weapon as one which "is capable of producing and is likely to produce bodily harm" (R. 91). The jury properly found that this element of the offense was established by the evidence.

contrary is proved. *Wheeler* v. *United States, supra,* 317 F. 2d at 618.[37] In this case the evidence showed that during the savings and loan robbery, petitioner displayed a Luger-type weapon to the controller and stated that if there were any trouble, he would "blow the place apart" (R. 5). During the Bank of America robbery, petitioner passed a note stating that if there were no noise "nobody will get hurt", and he started "drawing out a gun" (R. 15). The jury's finding that petitioner placed life in jeopardy by use of a dangerous weapon is thus amply supported.

Moreover, the sentence imposed on petitioner for each robbery is less than the maximum permitted for the unaggravated form of the offense. That petitioner did in fact commit the robberies in question was overwhelmingly established by the evidence.[38]

---

[37] *Smith* v. *United States*, 309 F. 2d 165 (C.A. 9), on which petitioner relies (Br. 58), holds only that a statement by a United States Attorney that it made no difference whether or not a gun was loaded was misleading, so that a plea of guilty entered after such an answer to the defendant's question should properly have been set aside.

[38] Review of the question directed to the goverment attorney's closing argument (Br. 53–56), which was first requested in petitioner's Motion for Leave to Amend Petition (dated December 3, 1965), was denied by this Court on January 17, 1965.

## CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

THURGOOD MARSHALL,
*Solicitor General.*
FRED M. VINSON, JR.,
*Assistant Attorney General.*
RALPH S. SPRITZER,
NATHAN LEWIN,
*Assistants to the Solicitor General.*
BEATRICE ROSENBERG,
ROLAND L. GAINER,
*Attorneys.*

FEBRUARY 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966